

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01

of

WHISTLING RIDGE ENERGY, L.L.C.

for

WHISTLING RIDGE ENERGY
PROJECT

FRIENDS OF THE COLUMBIA GORGE'S
PETITION FOR RECONSIDERATION

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I. Introduction

Intervenor Friends of the Columbia Gorge, Inc. (“Friends”) hereby petitions the Council for reconsideration of Whistling Ridge Energy Project (“WREP” or “Project”) Orders No. 23 and 24 (Council Orders No. [868](#) and [869](#), respectively) and the draft Site Certification Agreement (“Draft SCA”) prepared by the Council in this matter.¹ This petition will address preemption; land use and forest practices compliance; scenic, wildlife, and other impacts; violations of [WAC 463-30-093](#)²; and internal conflicts and omissions within and between the Council’s Orders and Draft SCA.

Friends also continues to urge that the Project be denied. The Applicant did not meet its burden of demonstrating that the Project would avoid and minimize impacts to the environment, further the public interest, and supply abundant energy to the people of Washington State. In addition, the evidence in the record shows that the Project would cause unacceptable impacts to nationally significant resources and local community interests, even while providing little to no public benefit. The evidence has shown that the small amount of energy that would be produced by this Project does not justify allowing the Applicant to irreparably harm the Columbia River Gorge and its national heritage, sensitive wildlife species, rural communities, and tourism-dependent economy—especially when the State of Washington already has sufficient wind energy supply to meet its renewable energy needs. Because the tremendous adverse impacts of

¹ Friends requests oral argument on this Petition. Despite the extraordinary nature and national importance of this matter, Friends has been allowed only ten minutes to present oral argument since the beginning of the hearing in January 2011, in the form of a brief opening statement. Given the wide array of complex issues, the length of the administrative record, and the multiple parties with divergent positions in this matter, we believe oral argument on any petitions for reconsideration will be time well spent.

² [WAC 463-30-093](#) requires the Council to separate the issues for discussion and voting so that the Council member representing the local jurisdiction (in this case, Skamania County) may discuss and vote only on issues affecting the County.

1 the Project greatly outweigh its minimal benefits, the proposal is not in the public interest and
2 should be denied.

3 4 **II. Request for Reconsideration**

5 **A. The Council should reconsider its findings and conclusions regarding land use** 6 **consistency and preemption.**

7 The Council should reconsider its findings and conclusions regarding land use consistency
8 and preemption. As was demonstrated in the land use proceedings, the project is *not* consistent
9 with local land use authorities. The Council's Adjudicative Order errs by concluding otherwise.
10 In addition, because the Council erroneously found the Project consistent, it never engaged in the
11 preemption inquiry required by its rules.

12
13 The Council should reconsider its findings and conclusions regarding land use consistency
14 and preemption. Ultimately, the Council should find the project inconsistent with local land use
15 authorities and should schedule a hearing on whether to recommend preemption.

16 **1. The Adjudicative Order misinterprets the applicable law on preemption of** 17 **local land use authorities.**

18 At the outset, the Adjudicative Order misinterprets the applicable law on preemption of
19 local land use authorities. The Adjudicative Order states that "[i]f . . . the Council determines that
20 [a proposed project] is inconsistent [with local land use requirements], the local land use
21 requirements are preempted by operation of law." [Order No. 868](#) at 9.³ If this statement is
22 intended to mean that the local land use requirements are *automatically* preempted by operation
23 of law, then the statement is not correct and should be stricken. Contrary to the statement in the
24 Order, if a project is inconsistent with land use requirements, then those land use requirements
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27 ³ The footnote attached to this conclusion (footnote 11) appears to have not actually been
28 included in the Order.

1 can be preempted *only if* (1) the Council holds a hearing to consider preemption and (2) the
2 Governor affirmatively decides to preempt.⁴ While the Siting Act provides the Council and the
3 Governor with authority to regulate and certify certain types of energy projects that may be in
4 conflict with state or local laws, *see* [RCW 80.50.110](#), the procedures set forth in the Council's
5 rules for preempting land use requirements must be followed.

7 **2. The Council should reconsider whether Skamania County adopted a**
8 **certificate of land use consistency in this matter.**

9 The Adjudicative Order erroneously concludes that Skamania County adopted a certificate
10 of consistency in this matter, and misunderstands Friends' arguments regarding *Columbia*
11 *Riverkeeper v. Cowlitz County*, Cowlitz County Superior Court No. 07-2-00400-0 (May 2,
12 2007), *appeal dismissed by stipulated motion*, Wash. Ct. App. No. 36393-3-II (Dec. 12, 2007),⁵
13 on issues involving certificates of consistency.

15 Although the *Columbia Riverkeeper* decision is short, it decided two things: (1) certificates
16 of consistency (such as the certificate issued by Cowlitz County in that case) are land use
17 decisions under the Land Use Petition Act ("LUPA"), [RCW Chapter 36.70C](#), and (2) LUPA is
18 superseded and preempted by [RCW 80.50.110](#).⁶ Because the case involved a certificate of
19 consistency presented to the Council, it is instructive as to whether certificates of consistency are
20 land use decisions.

23 ⁴ See WAC [463-28-010](#), [-060](#), [-070](#), [-080](#).

24 ⁵ A copy of the *Columbia Riverkeeper* court decision is attached to this Petition as Exhibit A.
25 Friends provided copies of the *Columbia Riverkeeper* court decision and Cowlitz County certificate of
26 consistency to Skamania County, Whistling Ridge Energy, LLC, and Save Our Scenic Area on March 23,
2010, in a related appeal before the Columbia River Gorge Commission, *Drach v. Skamania County*,
CRGC No. COA-K-09-03.

27 ⁶ The *Columbia Riverkeeper* decision did not, as the Adjudicative Order states, determine that
28 certificates of consistency are "exempt from the requirements of [RCW 43.21C.030](#)" (a provision of the
State Environmental Policy Act). [Order No. 868](#) at 10.

1 In the Whistling Ridge matter, Skamania County consciously avoided making a land use
2 decision about the consistency of the Project, and thus could not have adopted a certificate of
3 consistency. Skamania County plainly stated that it was adopting and presenting a “staff report to
4 EFSEC,” and “not a [land use] decision.” [Ex. 2.03](#) at 2. Moreover, these actions by the County
5 were in stark contrast with its earlier adoption of a certificate of consistency for the WREP,
6 which certificate the County has rescinded. *See* [Friends Land Use Op. Br.](#) at 2–3.

8 The reason Skamania County chose to adopt a staff report rather than a certificate of
9 consistency the second time around was to prevent an appeal of its actions to the Columbia River
10 Gorge Commission. The County has admitted as much. [Skamania County Land Use Resp. Br.](#) at
11 3 n. 6 (“The Resolution stated it is to be interpreted as a staff report to EFSEC rather than a
12 decision, to make clear the Resolution is not an appealable decision.”).⁷ Skamania County *could*
13 *have* adopted a certificate of consistency (as it did the first time), but it chose not to, and instead
14 adopted a staff report.

17 The County cannot have it both ways: it cannot consciously avoid adopting a certificate of
18 consistency to avoid appellate review by the Gorge Commission, and then later claim that it did
19 in fact adopt a certificate. The Council should reconsider its conclusion that Skamania County
20 adopted a certificate of consistency. Otherwise, the Council has improperly shifted the burden to
21 those arguing the project is inconsistent with local land use authorities.⁸

23 ///

26 ⁷ Indeed, the Gorge Commission determined that it did not have jurisdiction over the County’s
staff report in this matter. [Drach v. Skamania County](#), CRGC No. COA-K-09-03 (Aug. 24, 2010).

27 ⁸ *See* [WAC 463-26-090](#) (Certificates of consistency “will be regarded as *prima facie* proof of
28 consistency and compliance with such land use plans and zoning ordinances absent contrary
demonstration by anyone present at the hearing.”).

1 **3. The Adjudicative Order misinterprets the Skamania County Hearing**
2 **Examiner’s 2009 SEPA appeal decision regarding the County’s proposed**
3 **zoning amendments for energy development.**

4 The Adjudicative Order misinterprets the Skamania County Hearing Examiner’s 2009
5 SEPA appeal decision⁹ regarding the County’s proposed zoning amendments for energy
6 development. The following sentence from the Adjudicative Order misunderstands the nature of
7 the Skamania County SEPA appeal and the Hearing Examiner’s ultimate conclusions:

8 The County’s attempt to update zoning ordinances to better mesh with the
9 comprehensive plan was rejected on review for failure to complete an
10 environmental review, which the Council is conducting for this Project.

11 Order No. 868 at 13. The errors in this single sentence are many.

12 First, the County was not “attempting to update [its] zoning ordinances to better mesh with
13 the comprehensive plan.” *Id.* Rather, the County was proposing to amend its zoning ordinances
14 to authorize large-scale energy development, including privately operated wind energy facilities,
15 throughout the vast majority of the County. Rather than “meshing” with the Comprehensive
16 Plan, these types of uses are not even “contemplate[d]” by the Comprehensive Plan:

17 The 2007 Comprehensive Plan does not contemplate the type of energy facilities
18 described in the Planning Commission Recommended Draft. With respect to the
19 Conservancy designation, which includes the majority of the County and which
20 could be implemented by the Residential 10, Forest Lands 20, Commercial
21 Resource Lands 40, and Natural zones (see 2007 Comprehensive Plan, Figure 2-2,
22 and AR-97 to 98), the Comprehensive Plan lists only the following utility uses as
23 being appropriate within the designation: “Public facilities and utilities,^[10] such as
24 parks, public water access, libraries, schools, utility substations, and
25 telecommunication facilities.” *2007 Comprehensive Plan, page 26.*

26 ⁹ The Hearing Examiner’s decision can be found in the record at Exhibit 1.17C.

27 ¹⁰ “Facilities which are owned, operated, and maintained by public entities which provide a public
28 service required by local governing bodies and state laws.” SCC 21.08.010(70); *see also* Ex. 1.17C at 6
 (Finding No. 12 & n.17) (“The Hearing Examiner was not able to locate any use classification [in the
 current zoning ordinance] relating to private utility systems.”).

1 Ex. 1.17C at 8 (Finding/Conclusion No. 18). The County argued at page 5 of its response brief in
2 that appeal that private large-scale energy development uses (including commercial wind
3 projects) were already allowed, and that the County’s proposed zoning amendments would have
4 the effect of *reducing* the environmental impacts of such types of projects:
5

6 Here, Skamania County is implementing a zoning ordinance and maps. The
7 effect will be to reduce and control development. Without implementation of the
8 ordinance, any type of use is allowed, without specific controls.

9 The Hearing Examiner noted the County’s arguments,¹¹ but rejected them with multiple
10 conclusions in her decision:

- 11 • “[T]he County did not consider the types of development that might result from the
12 amendments.” (Ex. 1.17C at 27, Conclusion #1)
- 13 • “The Appellants have demonstrated, consistent with *King County v. Boundary Review*
14 *Board*, that development with significant adverse environmental impacts is probable after
15 adoption of the proposed zoning amendments.” Ex. 1.17C at 27, Conclusion #2)
- 16 • “Development of wind energy facilities is probable after the zoning action” (Ex.
17 1.17C at 27, Conclusion #2.E.)

18 In other words, the zoning code amendments at issue in the SEPA appeal would have authorized
19 private wind energy development and other types of uses that had not been previously authorized
20 under the zoning code, and these changes would have resulted in significant adverse
21 environmental impacts.

22 The second error in the sentence from the Adjudicative Order quoted above is that it states
23 that the Hearing Examiner “rejected on review” the proposed zoning amendments “for failure to
24 complete an environmental review.” Order No. 868 at 13. The Hearing Examiner did not reject
25 the zoning amendments themselves; rather, the Hearing Examiner held that before the County
26

27 ¹¹ “[T]he County argued . . . that the proposed amendments would be an improvement over the
28 existing regulatory scheme.” Ex. 1.17C at 11 (Finding No. 26).

1 can allow large-scale energy development for the first time, it must first prepare an EIS pursuant
2 to SEPA because of the significant environmental impacts that could result from the newly
3 allowed uses. *See* [Ex. 1.17C](#) at 29.¹² In other words, the Hearing Examiner rejected the County’s
4 determination of non-significance, not the proposed zoning amendments. *See id.*

6 Finally, the quoted sentence confusingly states that “the Council is conducting for this
7 Project” the environmental review found lacking by the Hearing Examiner for the proposed
8 zoning amendments. [Order No. 868](#) at 13. The Council should clarify that its EIS in this matter
9 was prepared specifically for the proposed Whistling Ridge Energy Project, and is not intended
10 as a substitute for the county-wide EIS that the Hearing Examiner found was required for the
11 proposed zoning amendments.
12

13 In conclusion, the Council appears to misunderstand the nature of the Skamania County
14 SEPA zoning appeal, and its relevance to the instant matter. The Skamania County Hearings
15 Officer determined that before Skamania County can rezone to authorize energy development, it
16 must first prepare a programmatic EIS. If such uses were already allowed under the current
17 zoning, there would have been no need for the Hearing Examiner to require an EIS for the
18 County’s proposed zoning changes, because the changes would not result in significant impacts.
19 The Council should reconsider its findings and conclusions regarding the Hearing Examiner’s
20 decision.
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25

26 ¹² Moreover, contrary to the statements in the Council’s adjudicative order, Skamania County *did*
27 complete an environmental review in the rezoning matter, consisting of an environmental checklist and
28 determination of non-significance. [Ex. 1.17C](#) at 8, 11 (Findings No. 19, 27, 28). The issue was not
whether Skamania County completed an environmental review, but whether its environmental review was
adequate. Ultimately, the Hearing Examiner found that an EIS was required. [Ex. 1.17C](#) at 29.

1 **4. The Council should reconsider and strike all conclusions and findings that the**
2 **proposed WREP is allowed under the County Comprehensive Plan and zoning**
3 **ordinance.**

4 The Council should reconsider and strike from the Adjudicative Order all conclusions and
5 findings that the proposed WREP is allowed under the County Comprehensive Plan and zoning
6 ordinance,¹³ including the Council’s ultimate conclusion that “[t]he project is permitted as of
7 right in the underlying unmapped area.” [Order No. 868](#) at 13.¹⁴ As explained above and in
8 Friends’ and SOSA’s prior briefing,¹⁵ private large-scale wind-energy facilities are *not*
9 authorized on the Unmapped lands. Furthermore, the County has “shelved” its plans to allow
10 such development in the zoning code because it does not want to first prepare an environmental
11 impact statement. [Jan. 11, 2011 Tr.](#) at 1343:3 (testimony of Paul Pearce). The County’s
12 abandonment of the proposed energy-related zoning amendments is the very reason this
13 Applicant sought certification under the Siting Act from this Council,¹⁶ only three weeks after
14 the Hearing Examiner held that an environmental impact statement is required for the proposed
15 rezoning.¹⁷ Indeed, both the Applicant and the County have urged the Council in these
16 proceedings to preempt the local zoning authorities as part of the Council’s review.¹⁸

17 Now, the Council’s decision sets a dangerous precedent that could result in future energy
18 development and other projects being built throughout the Unmapped lands (*i.e.* most of the
19
20
21

22 ¹³ See [Order No. 868](#) at 1, 10–13, 35–36.

23 ¹⁴ The Council’s finding that the project is allowed “as of right” appears to be the equivalent of
24 stating that the proposed project is allowed *outright*, which in the Skamania County zoning ordinance is
called an “allowable use.” See [SCC § 21.08.010\(87\)](#) (definition of “allowable use”).

25 ¹⁵ [Friends Land Use Op. Br.](#) at 9–12; [SOSA Land Use Op. Br.](#) at 11–17.

26 ¹⁶ [Jan. 11, 2011 Tr.](#) at 1342–46; [Jan. 3, 2011 Tr.](#) at 87:22–88:16 (testimony of Jason Spadaro); [Ex.](#)
27 [51.00r](#) at 8:23–9:4 (testimony of Paul Pearce)

28 ¹⁷ The Hearing Examiner’s decision was issued on February 19, 2009. [Ex. 1.17C](#) at 29. The
Applicant filed its original Application for this Project with the Council on March 10, 2009.

¹⁸ [Skamania County Land Use Resp. Br.](#) at 2:1–2; [Applicant Land Use Resp. Br.](#) at 15:2–4; [Jan.](#)
[11, 2011 Tr.](#) at 1359:2–10 (testimony of Paul Pearce); Amended Application at [4.2-14](#).

County) without any planning review.¹⁹ The Council should reconsider and strike these portions of its opinion, and should schedule a hearing on whether to recommend preemption to the Governor.

5. The Council misinterprets the County’s moratorium prohibiting development on the Unmapped lands.

As discussed above, most of Skamania County, including most of the Project site, is currently classified as “Unmapped” or “unzoned” land. Since 2007, Skamania County has prohibited development on commercial forest lands in the Unmapped lands, where such development would convert forest uses to non-forest uses.²⁰ The County has accomplished this prohibition by adopting a series of moratoria against development in the Unmapped lands.²¹ The moratoria were imposed in pertinent part to meet the requirements of the Growth Management Act, RCW Chapter 36.70A, for protecting commercial forest lands.²² To accomplish this goal, the moratoria prohibit the acceptance and processing of SEPA checklists for forest practice conversions on the Unmapped lands, thus effectively prohibiting the conversions themselves.²³

There is no dispute that the Project site contains commercial forest land and that the Project would constitute a conversion from commercial forestry uses to industrial uses.²⁴ And

¹⁹ As the County’s zoning ordinance states, uses allowed outright do “not require obtaining Planning Director’s review and approval.” See [SCC § 21.08.010\(87\)](#) (definition of “allowable use”).

²⁰ See [Friends Land Use Op. Br.](#) at 9–12 and material cited therein.

²¹ The County adopted the most recent moratorium ordinance, [Ordinance 2011-03](#), on June 14, 2011, and as with the prior ordinances, it is effective for six months. [Ordinance 2011-03](#) is attached as Exhibit B. Friends asks the Council to take official notice of this ordinance, which had not yet been adopted at the time of the hearing and thus could not be filed then.

²² [Ex. 1.15C](#) at 1 (“Whereas, the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses . . .”).

²³ See [Ex. 1.15C](#); Skamania [Ordinance 2011-03](#) (attached as Exhibit B).

²⁴ See [Ex. 1.00](#) (testimony of Jason Spadaro) at 9:12–10:15; [Jan. 3, 2011 Tr.](#) at 144:10–14 (testimony of Jason Spadaro).

1 there is little dispute that the County's moratoria apply to the activities proposed for this project;
2 the Applicant has even implicitly requested that the State preempt the moratoria pursuant to
3 [WAC Chapter 463-28](#).²⁵
4

5 The Council's Adjudicative Order spends only two sentences addressing the County's
6 moratoria, and summarily dismisses the moratoria as being "relating to forest practices," neither
7 a zoning ordinances nor a land use plan under [RCW Chapter 80.50](#), and "irrelevant" to the
8 Council's land use consistency determinations:
9

10 Taking a second tack, the project's opponents challenge²⁶ various state and
11 local provisions relating to forest practices, which are also irrelevant here as being
12 neither zoning ordinances nor land use plans within the meaning of [RCW 80.50](#).
13 These include a moratorium ([Ex. 1.15C](#)) on certain types of development of forest
14 areas.

15 [Order No. 868](#) at 11.

16 The Council is wrong. The County's moratoria against development on unzoned lands are
17 zoning ordinances within [RCW 80.50.020\(22\)](#), which defines "zoning ordinance" as

18 an ordinance of a unit of local government regulating the use of land and adopted
19 pursuant to [chapter 35.63](#),^[27] [35A.63](#),^[28] [36.70](#),^[29] or [36.70A](#)^[30] RCW or [Article XI](#)^[31] of the state Constitution, or as otherwise designated by [chapter 325](#),^[32]
20 Laws of 2007.

21 Here, the County's moratoria fit all of the criteria under the definition of "zoning ordinance."

22 First, the moratoria are ordinances. Second, they regulate the use of land. And third, the

23 ²⁵ Amended Application at [4.2-14](#).

24 ²⁶ Friends and SOSA do not *challenge* the cited authorities; rather, we ask the Council to apply
25 them.

26 ²⁷ "Planning Commissions."

27 ²⁸ "Planning and zoning in code cities."

28 ²⁹ Planning Enabling Act.

³⁰ Growth Management Act.

³¹ [Article XI, section 4](#) authorizes the establishment of a system of county government.

³² Authorizes local jurisdictions to enact policies identifying corridors for electrical transmission
facilities. See [RCW 80.50.330\(2\)](#).

1 moratoria were adopted pursuant to the Growth Management Act, [RCW 36.70A](#), and the
2 Planning Enabling Act, [RCW 36.70](#). The moratoria expressly cite these acts as authority for their
3 adoption:
4

- 5 • “Whereas, the Growth Management Act requires all counties in the State of Washington
6 to provide protections for commercial forest land from the encroachment of residential
7 uses.” ([Ex. 1.15C](#) at 1)
- 8 • “[T]he County Commissioners are determining which areas will be designated as
9 commercial forest land and protected from the encroachment of residential uses as
10 required by the Growth Management Act.” ([Ex. 1.15C](#) at 2)
- 11 • “Whereas, the Board of County Commissioners has the authority pursuant to [RCW](#)
12 [36.70.795](#)^[33] to adopt a moratorium . . . A moratorium may be renewed for one or more
13 six-month period(s) if a subsequent public hearing is held and finding[s] of fact are made
14 prior to each renewal.” ([Ex. 1.15C](#) at 3)

15 The Council should reconsider whether the interim moratorium is a zoning ordinance
16 within the meaning of RCW 80.50.020(22). It also should determine that the Project is
17 inconsistent with the moratorium, which prohibits conversions from forestry uses to non-forestry
18 uses on commercial forest lands in the Unmapped lands. Finally, the Council should schedule a

19 ³³ **Moratoria, interim zoning controls — Public hearing — Limitation on length.**

20 A board that adopts a moratorium, interim zoning map, interim zoning ordinance,
21 or interim official control without holding a public hearing on the proposed moratorium,
22 interim zoning map, interim zoning ordinance, or interim official control, shall hold a
23 public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance,
24 or interim official control within at least sixty days of its adoption, whether or not the
25 board received a recommendation on the matter from the commission or department. If
26 the board does not adopt findings of fact justifying its action before this hearing, then the
27 board shall do so immediately after this public hearing. A moratorium, interim zoning
28 map, interim zoning ordinance, or interim official control adopted under this section may
be effective for not longer than six months, but may be effective for up to one year if a
work plan is developed for related studies providing for such a longer period. A
moratorium, interim zoning map, interim zoning ordinance, or interim official control
may be renewed for one or more six-month periods if a subsequent public hearing is held
and findings of fact are made prior to each renewal.

[RCW 36.70.795](#).

1 public hearing to address whether the Council should recommend preemption of the countywide
2 moratorium for this project, pursuant to [WAC Chapter 463-28](#).

3 **B. The Council should reconsider its findings, conclusions, and draft conditions**
4 **regarding forest practices.**

5 The Council correctly concludes that it has jurisdiction to ensure compliance with forest
6 practices requirements under the Forest Practices Act (“FPA”), [RCW Chapter 76.09](#), and the
7 Forest Practices Rules, [WAC Title 222](#) (and presumably with [Skamania County Code Title 23](#),
8 as well).³⁴ However, the Council concludes that it can wait until *after* the SCA is signed to
9 address and resolve Forest Practices Act compliance,³⁵ even though this is a contested issue³⁶ and
10 even though the proposed forest practices for the Project are described in the Application itself³⁷
11 and in the FEIS.³⁸ The Council’s approach of carving out this portion of the Project and deferring
12 Council review until a later date would violate the Council’s rule that “[e]very recommendation
13 to the Governor shall . . . [c]ontain a recommendation *disposing of all contested issues*.” [WAC](#)
14 [463-30-320\(6\)](#) (emphasis added); *see also* [RCW 34.05.570\(3\)\(f\)](#) (A reviewing court may grant
15 relief from an agency order if “the agency has not decided all issues requiring resolution by the
16 agency.”).

17 The Council may not defer Council review of forest practices compliance to a later date, an
18 approach that is both inefficient and inconsistent with the Council’s duties to review the
19 application and resolve contested issues. Instead, the Council must address forest practices issues
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25 ³⁴ See [Order No. 868](#) at 30, 40 (Finding/Conclusion No. 41); [Draft SCA](#) at 29 (Condition IV.M);
26 [Order No. 869](#) at 16 (Finding/Conclusion No. 32).

27 ³⁵ See [Order No. 868](#) at 30; [Draft SCA](#) at 29 (Condition IV.M).

28 ³⁶ See [Order No. 868](#) at 11.

³⁷ See Amended Application at [2.3-9-2.3-11](#), [2.20-6](#), [3.4-10](#).

³⁸ See FEIS at [2-14-2-17](#) (§ 2.1.6).

1 prior to its recommendation to the Governor, and must incorporate any findings, conclusions,
2 and conditions regarding the forest practices aspects of this Project into any final SCA.

3 In the event the Council continues to recommend deferring any analysis of the forest
4 practices aspects of the proposal until after the Project is approved and an SCA is signed, Friends
5 requests two changes to the [Draft SCA](#). First, the Council must provide notice of its future
6 decisions on forest practices so that interested parties who wish to exercise their appeal rights
7 under the Administrative Procedure Act, [RCW 34.05.570](#), and the Siting Act, [RCW 80.50.140](#),
8 may do so.
9

10
11 Second, the Council's Recommendation Order would require a forest practices
12 application or notification only sixty days "*prior to construction*"³⁹ and the Draft SCA would
13 require an application or notification only sixty days "*prior to initiating ground disturbance*
14 *activities*."⁴⁰ Forest practice applications and/or notifications should be submitted *prior to the*
15 *forest practice activities*, not prior to construction or ground disturbance.
16

17 In conclusion, the Council must address forest practices issues now, rather than deferring
18 the analysis and decision(s). But if the Council continues to delay its resolution of forest
19 practices issues, Friends recommends the following changes to the Council's Recommendation
20 Order and the Draft SCA:
21

- 22 • 32. The Applicant must ~~prepare~~ submit to EFSEC a Forest Practices Applications and/or
23 Notifications coordinated with the Department of Natural Resources (DNR) sixty days
24 prior to ~~construction~~ initiating any forest practice activities for the Project. ([Order No.](#)
[869](#) at 16)
25 • At least 60 days prior to initiating ~~ground disturbance activities~~ any forest practice
26 activities for the Project, the Certificate Holder shall submit to EFSEC for review and

27 ³⁹ [Order No. 869](#) at 16 (Finding/Conclusion No. 32) (emphasis added).

28 ⁴⁰ [Draft SCA](#) at 29 (Condition IV.M) (emphasis added).

1 approval ~~a~~ complete Forest Practices Applications/ and/or Notifications that addresses all
2 forest practices, including, but not limited to, timber harvest, road
3 construction/reconstruction and reforestation activities. Prior to submittal to EFSEC, the
4 Certificate Holder shall coordinate with Southwest Region of the Department of Natural
5 Resources (DNR) to ensure that the application is completed in compliance with DNR
6 requirements. The Council shall provide notice of any forest practice decisions for the
Project to its mailing list for the Project and shall include notification of appeal rights
pursuant to [RCW Chapter 34.05](#) and [RCW 80.50.140](#). (Draft SCA at 29 (Condition
IV.M))

7 **C. The Council should reconsider its findings, conclusions, and draft conditions**
8 **regarding aesthetic, cultural, and heritage resources of the Columbia River Gorge.**

9 The Council correctly found that the Columbia River Gorge is an important part of the
10 aesthetic, cultural, and natural heritage of the country and is in need of protection from the
11 adverse impacts of large-scale energy development.⁴¹ The Council also concluded that a portion
12 of the “A” array and the entire “C” array would cause impermissible impacts to the Columbia
13 River Gorge and should be denied.⁴²

15 Friends strongly supports the Council’s finding that the Columbia River Gorge is an
16 important part of our aesthetic, cultural, and natural heritage. Friends also supports the Council’s
17 intentions to avoid likely adverse impacts on aesthetic and cultural heritage resources caused by
18 the Project. However, the Council’s recommendation would still result in unacceptable scenic
19 impacts, particularly as viewed from locations to the east and southeast (e.g., Viewpoints 2 and
20 11). For example, there would still be overlapping clusters of turbines as viewed from these
21 viewpoints that would result in the “chaotic, jumbled appearance” that expert Dean Apostol cited
22
23

24 ///

26 ⁴¹ [Order No. 869](#) at 7, 13 (Finding/Conclusion No. 12); [Order No. 868](#) at 16–24, 37
27 (Findings/Conclusions No. 21, 23–24).

28 ⁴² [Order No. 869](#) at 13 (Finding/Conclusion No. 13–14), [Order No. 868](#) at 37
(Findings/Conclusions No. 23–24) (citing [RCW 80.50.010\(2\)](#), [80.50.040\(8\)](#)).

1 as a major reason for the Project's high scenic impacts.⁴³ The Council should reconsider its
2 findings, conclusions, and recommendations regarding the aesthetic and heritage impacts of the
3 remaining portions of the Project.⁴⁴
4

5 In addition, the Council should correct errors in its scenic analysis regarding the numbers
6 of turbines that would be visible with the Council's recommended Project changes. The Council
7 should also consider available and reasonable methods to avoid and mitigate the remaining
8 impacts. These measures include requiring the use of radar-triggered aviation safety lighting,
9 requiring that turbine blades be locked when not generating energy, and requiring off-site
10 mitigation for scenic impacts. Finally, the Council should revise the Draft SCA to include all of
11 the mitigation measures and conditions of approval listed in the Council's Orders.
12

13 **1. The Council should address the cluttered and chaotic appearance of the**
14 **Project as seen from important viewing locations.**

15 Even with the fifteen turbines removed from the Project as recommended by the Council,
16 the Project would still create a cluttered appearance in a high-value scenic landscape as seen by
17 highly sensitive viewers. The Council should reconsider its findings and conclusions on the
18 scenic impacts of the Project, and should require additional turbines to be removed to reduce
19 scenic impacts from important viewing areas. In so doing, the Council should focus on measures
20 that would reduce the overlapping, cluttered, and chaotic appearance of the Project as viewed
21 from the east and southeast.
22
23

24 The Council received testimony from landscape architect Dean Apostol that scenic impacts
25 intensify when wind turbines appear in overlapping, cluttered, and chaotic arrangements, because
26

27 ⁴³ Ex. 21.00 at 23:19–22; see also *id.* at 25:12–13, 29:17–18.

28 ⁴⁴ See Order No. 868 at 37 (Finding/Conclusion No. 24); Order No. 869 at 14
(Findings/Conclusions No. 14, 16).

1 such arrangements appear less “coherent” and can lead to higher contrast with surrounding
2 landscapes.⁴⁵ Mr. Apostol specifically identified project layouts that “present a less chaotic
3 appearance” as a possible mitigation measure.⁴⁶ As viewed from locations to the east of the
4 Project, including the City of White Salmon, Washington State Route 141, Interstate 84, the
5 Columbia River, and the Historic Columbia River Highway, the “B,” “D,” and “E” turbine
6 corridors would present an overlapping and chaotic appearance.⁴⁷ Affected viewer types include
7 residential, roadway travelers, visitors to the Lewis and Clark National Historic Trail, and
8 countless recreational users in the area, which are all highly sensitive viewers.⁴⁸

9
10
11 In addition, the affected landscape as viewed from the east has been documented as having
12 at least high scenic quality. This is evidenced by the Forest Service’s scenic resource inventory
13 of the affected viewshed, which found the landscape between the White Salmon River and the
14 location of the “B,” “D” and “E” arrays to have high scenic quality.⁴⁹

15
16 The impacts of these turbines were best described by Mr. Apostol in his analysis of
17 impacts to views from Interstate 84 and the Columbia River as seen from the east. Mr. Apostol
18 explained that the problem

19 is the chaotic, jumbled appearance of the turbines. They are bunched up and
20 overlap each other, creating too much visual density, with too little space between
21 individual turbines and clusters. The turbines viewed from this vantage point
22 present a very high contrast. Given the huge number of viewers, long view
23 duration, and high sensitivity, the visual impact from the I-84 KVA and the
24 adjacent Columbia River KVA in this area is very high.

25 ⁴⁵ [Ex. 21.00](#) at 5:11–12, 22:15, 23–24.

26 ⁴⁶ *Id.* at 24:2–7.

27 ⁴⁷ *See, e.g.*, [Ex. 8.08r](#) (viewpoints 1, 2, 3, 11, 12, 19).

28 ⁴⁸ *See, e.g.*, [Ex. 21.00](#) at 14:4–12; [Ex. 21.02](#) at 2; [Ex. 21.04](#) at 1; FEIS at 3-165.

⁴⁹ *See* Friends Adj. Op. Br. at 28:9–14 (citing [Ex. 21.02](#) at 2; [Ex. 21.06](#)); *see also* [Ex. 21.00](#) at 22:16–21 (testimony of Dean Apostol).

1 [Ex. 21.00](#) at 23–24. The same reasoning applies equally to views from White Salmon and
2 Washington State Route 141. The Council should reconsider its findings specifically to address
3 these high impacts to aesthetic and heritage resources, including ways to reduce these impacts
4 such as the removal of additional turbines.
5

6 **2. The Council should correct calculation errors in its Viewing Site Analysis.**

7 The “Viewing Site Analysis” in Table 1 of the Council’s Adjudicative Order includes
8 erroneous calculations about the reductions in numbers of visible turbines that would be
9 achieved under the Council’s recommendation. [Order No. 868](#) at 23 (Table 1).⁵⁰ The Council
10 should correct these errors.
11

12 Table 1 compiles data on the numbers of turbines that would be visible from various
13 viewpoints based on different layout options. The Council recommended “Option 3” based, in
14 part, on this analysis. [Order No. 868](#) at 22. However, the calculations for several viewpoints
15 contain errors that *overestimate* the reduction in numbers of visible turbines from several
16 viewpoints and *underestimate* the impacts of the remaining turbines.
17

18 For Viewpoint 1 (located within the City of White Salmon), the Table erroneously states
19 that Option 3 would reduce by one-half the number of turbines visible. In fact, according to the
20 turbines listed in the table, the actual reduction would be only one-third (a reduction from 24
21 visible turbines to 16 visible turbines).
22

23 For Viewpoints 4,⁵¹ 16,⁵² 22,⁵³ and 23,⁵⁴ the Table erroneously states that Option 3 would
24 reduce the number of visible turbines to either “zero” or “approximately zero.” [Order No. 868](#) at
25

26 ⁵⁰ The same table is also included as Attachment 2 to the [Draft SCA](#).

27 ⁵¹ Ausplund Road and Cook-Underwood Road (in Underwood).

28 ⁵² Fairview Drive (in west Hood River).

23 (Table 1). However, turbine A8 would not be removed under Option 3 and therefore would still be visible from all four of these viewpoints; thus, the number of visible turbines should be corrected to one.

**Proposed Corrections to Table 1
Viewing Site Analysis**

<u>View Site</u>	<u>Option 0</u> (All Turbines) Resulting Visibility	<u>Selected Option 3</u> Turbines Reduced: A1-7, C1-8 Resulting Visibility	<u>CORRECTED</u> <u>Selected Option 3</u> Turbines Reduced: A1-7, C1-8 Resulting Visibility
1	B11-21, C1-8, D1-3, E1-2	Approximately 1/2 Reduction in Turbine Visibility	Approximately 1/3 Reduction in Turbine Visibility
4	A1-8	Approximately Zero Turbines Visible	One Turbine Visible
16	A1-8	Approximately Zero Turbines Visible	One Turbine Visible
22	A1-8	Zero Turbines Visible	One Turbine Visible
23	A1-8	Zero Turbines Visible	One Turbine Visible

3. The Adjudicative Order incorrectly states that the turbine corridors recommended for approval “must be allowed” instead of concluding that they “may” be allowed.

The Council’s Recommendation Order states that the turbine corridors recommended for approval “may be permitted.” [Order No. 869](#) at 7. The Council’s Adjudicative Order conflicts with this finding by stating that the same corridors “must be allowed.” [Order No. 868](#) at 24. The Council’s choice of terms has potentially important substantive implications. The phrase “must be allowed” could be interpreted as implying that the Council would not have the authority to deny these turbine locations if other unacceptable impacts are identified. To ensure consistency

⁵³ Cook-Underwood Road and King Road (in Underwood).

⁵⁴ Ausplund Road End (in Underwood).

1 with the Recommendation Order, the Council should revise the finding in the Adjudicative Order
2 as follows:

3 We also conclude that other portions, as to which some of the towers and/or
4 blades would be visible, are not impermissibly intrusive into the overall
5 viewscape or the area's heritage, and may ~~must~~ be allowed. (Order No. 868 at 24)

6 **4. The Council should require available and reasonable mitigation measures to**
7 **reduce the impacts to the aesthetic and heritage resources of the Columbia**
8 **River Gorge.**

9 The Siting Act requires the Council to ensure through "available and reasonable methods"
10 that the location and operation of energy facilities "will produce minimal adverse effects on the
11 environment." RCW 80.50.010. As the Council has recognized, aesthetic, heritage, and
12 recreational resources are part of the environment that must be protected.⁵⁵

13 While the Council's recommendation to eliminate turbine corridors avoids some adverse
14 impacts to these resources, the remaining turbine corridors would still cause adverse impacts.
15 This is evidenced in the record by testimony and comments from Mr. Apostol, the Forest
16 Service, and the National Park Service.⁵⁶ The impacts that would not be *avoided* by the Council's
17 recommendation must be *mitigated*.

18 In particular, the Council should focus on three available and reasonable methods to
19 mitigate the Project's scenic impacts: radar-triggered aviation lighting, locking turbine blades so
20 they do not spin when they are not generating energy, and the provision of off-site mitigation to
21 compensate for the Project's impacts.
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27 ⁵⁵ Order No. 869 at 7; Order No. 868 at 18, 37 (Findings/Conclusions No. 23–24).

28 ⁵⁶ See, e.g., Exs. 21.00, 21.02, 21.03, 21.04, 21.05.

1 **a. Radar-activated aviation safety lighting**

2 First, the Council should reconsider its conclusion that the aviation safety lighting required
3 by the Federal Aviation Administration (“FAA”) would not detract from the scenic values of the
4 Columbia River Gorge. *See* [Order No. 869](#) at 14 (Finding/Conclusion No. 16). This conclusion is
5 not supported by the evidence in the record and fails to address all available and reasonable
6 methods of minimizing impacts, thus violating the requirements of RCW 80.50.010.
7

8 The Council received substantial testimony and information regarding the impacts of
9 nighttime lighting on the predominantly natural-appearing ridgelines of the Columbia River
10 Gorge. This included commentary from witness Dean Apostol and experts at the U.S. Forest
11 Service (“USFS”), the National Academy of the Sciences (“NAS”), and the National Park
12 Service (“NPS”).⁵⁷
13

14 As a mitigation measure for this impact, Mr. Apostol specifically suggested radar-activated
15 aviation safety lighting. [Ex. 21.00](#) at 27:15–17. The Council should require the Project to use this
16 technology. It has been employed for other wind facilities specifically to reduce the impacts of
17 nighttime lighting. For example, the Wyoming Department of Environmental Quality’s Industrial
18 Siting Division recently issued a permit requiring a wind project developer to employ radar-
19 triggered lighting. *See* [Ex. C](#) at 5 (“[FAA] approval for remote control night lighting of wind
20 generating towers will be sought and installed within six months of [FAA] approval.”).⁵⁸
21

22 Radar-activated lighting technology is an available and reasonable measure of minimizing
23 impacts that should be required for the Whistling Ridge Project as a condition of approval
24
25

26 ⁵⁷ *See, e.g.*, [Ex. 21.02](#) at 4 (USFS Letter); [Ex. 21.00](#) at 6–7 (Testimony of Dean Apostol), [Ex.](#)
27 [21.04](#) at 2 (NPS Letter), [Adj. Pub. Comm. No. 351](#) (NAS Report) at 369, 372.

28 ⁵⁸ Friends requests that the Council take official notice of this recently issued permit, which was
not issued until July 18, 2011, and thus could not have been submitted prior to or during the hearing.

1 pursuant to RCW 80.50.010. Accordingly, Friends recommends the following language as a
2 condition of approval:

3 The Certificate Holder shall seek FAA approval for radar-triggered aviation safety
4 lighting.

5 **b. Locking turbine blades when they are not generating energy**

6 The Council's findings and conclusions also fail to address reasonably available measures
7 to minimize the scenic impacts of moving turbine blades. The Council received substantial
8 testimony on the scenic impacts of moving turbine blades.⁵⁹

9 A reasonable and readily available measure to minimize these impacts would be to require
10 the Certificate Holder to ensure that turbine blades are locked (*i.e.*, not spinning) when not
11 generating energy. This measure would reduce the extent to which moving blades attract the
12 viewer's attention away from the predominantly natural landforms in the vicinity of the Project.
13 And as discussed below with respect to wildlife, the measure would also reduce adverse impacts
14 to wildlife caused by avian and bat collision with the turbine blades. Accordingly, Friends
15 recommends the following condition of approval, which would likely have no impact on the
16 Project's production of energy, but would provide measurable benefits to scenic and wildlife
17 resources:
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19
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21 Prior to Commercial Operation, Certificate Holder shall prepare and implement
22 an operating plan for locking turbine blades when they are not generating energy.

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26 ⁵⁹ See, e.g., [Ex. 21.00](#) (testimony of Dean Apostol) at 6:12–16, 7:1–4, 22:3–7, 28:17; [Ex. 21.04](#)
27 (NPS Letter) at 2; [Ex. 61.02](#) (landscape architect Jurgen Hess) at 1–3 & [accompanying video](#); [Jan. 5,](#)
28 [2011 Tr.](#) at 567:18–19 (testimony of Jurgen Hess); [Jan. 4, 2011 Tr.](#) (testimony of Applicant's witness
Chris Watson) at 240:17–22, 244:6–10; [Ex. 21.00](#) (testimony of Chris Watson) at 5:1–3; [Pub. Comm. No.](#)
[354](#) (Will Bloch) at 22.

1 **c. Off-site mitigation measures**

2 As discussed above, the Project would result in aesthetic impacts even with some turbines
3 removed. Friends witness Michael Lang testified that off-site mitigation can be employed to
4 compensate for unavoidable impacts to scenic resources, and has successfully been employed for
5 landscapes affected by wind energy projects in the region. [Jan. 11, 2011 Tr.](#) at 1389–90.

6 The Council’s Orders and Draft SCA fail to consider off-site compensatory mitigation
7 measures to address any of the unavoidable aesthetic impacts of the Project. The Council should
8 require the Applicant to propose off-site compensatory mitigation measures that would improve
9 the scenic quality of the surrounding landscape. These could include the donation of land
10 interests (including conservation easements and/or fee simple titles) within the viewsheds
11 affected by the Project to appropriate holders, the establishment of a mitigation fund to acquire
12 scenic mitigation parcels, or deed restrictions to prevent development or other activities that
13 could affect scenic resources within the landscape. All of these are available and reasonable
14 methods for mitigating the scenic impacts of the Project pursuant to [RCW 80.50.010](#). The
15 Council should require the Applicant to propose these or similar measures prior to a final
16 Council recommendation.

17 **5. The Draft SCA fails to include key mitigation measures that were identified as**
18 **necessary in the Council’s Orders.**

19 The Council’s Orders discuss recommendations and explicit conditions that have not been
20 included in the Draft SCA. The SCA should be revised to explicitly include all terms and
21 conditions related to the protection of aesthetic and heritage resources discussed in the Orders.
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1 For example, the Council's Orders conclude that a portion of the "A" corridor and the
2 entire "C" corridor cannot be developed.⁶⁰ Accordingly, the Recommendation Order requires the
3 Applicant to file legal descriptions identifying these areas where Project development is
4 prohibited.⁶¹ Once these legal descriptions are filed with the Council, the Council should require
5 the Applicant to record deed restrictions prohibiting wind energy development on the described
6 lands. Friends recommends the following language for a condition of approval:
7

8 Wind energy development shall be permanently prohibited on certain lands as
9 described in Attachment 1. Certificate Holder shall record deed restrictions,
10 including a copy of this SCA and Attachment 1, in the County deed records for all
11 affected parcels within sixty (60) days of execution of this SCA.

12 In addition, the Adjudicative Order includes a requirement that the Applicant use
13 "micrositing"⁶² to reduce expected adverse impacts to scenic and heritage views of the Columbia
14 River Gorge. [Order No. 868](#) at 24. The Order states that "[t]he Site Certification Agreement will
15 require Applicant to prepare [for] approval a micrositing plan that minimizes visual impacts from
16 the Project on sensitive resources." *Id.* Despite the Council's finding, no such condition appears
17 within the Draft SCA.
18

19 Rather than defer the submission, review, and approval of a "micrositing plan" until a later,
20 post-decisional date, the Council should require the micrositing plan prior to its final
21 recommendation. Otherwise, there will be insufficient evidence in the record to demonstrate that
22 the Project will in fact minimize adverse scenic impacts, and the public will not have had a
23
24

25 ⁶⁰ [Order No. 868](#) at 22, 24 (Finding/Conclusion No. 24); [Order No. 869](#) at 7, 13
26 (Finding/Conclusion No. 13).

27 ⁶¹ [Order No. 869](#) at 13, n. 23 (Finding/Conclusion No. 13).

28 ⁶² The Council's rules do not define "micrositing" and do not authorize or otherwise mention
"micrositing plans."

1 chance to review and comment on whatever changes might be made to the Project via
2 “micrositing.”

3 If the Council fails to require the submission of a micrositing plan prior to its
4 recommendation, then it should at the very least add the condition it recommends in its
5 Adjudicative Order, and should clarify the process it recommends for review and approval of the
6 micrositing plan and final proposed Project layout.⁶³ If the micrositing plan and/or final proposed
7 layout differ from the layout approved by any SCA, the interested public and expert agencies
8 must be given an opportunity to review and comment on the proposed changes. Accordingly, the
9 following language should be added as a condition of approval to any final SCA:
10

11 Certificate Holder shall prepare and submit for EFSEC review and approval a
12 Micrositing Plan that minimizes the Project’s adverse visual impacts to sensitive
13 viewing areas. The Micrositing Plan shall include alternative micrositing layouts
14 and visual simulations demonstrating any expected reduction in scenic impacts.
15 Prior to making a decision on any Micrositing Plan, EFSEC shall solicit
16 comments from interested persons and agencies and hold a public hearing.

17 **D. The Council should reconsider its findings, conclusions, and draft conditions**
18 **regarding wildlife resources.**

19 The Adjudicative and Recommendation Orders make a number of errors regarding impacts
20 to wildlife resources. The Council should reconsider these portions of the Orders. In addition,
21 Friends requests several amendments to the Draft SCA to protect wildlife resources.

22 **1. The Council fails to recognize that the WDFW Wind Power Guidelines and**
23 **Council rules encourage the avoidance of commercial forestland used by**
24 **sensitive-status and priority species.**

25 The Council’s Adjudicative Order begins its discussion of wildlife impacts by finding that
26 wind development should be encouraged in commercial forestland, such as the Project site:

27 ⁶³ Condition IV.L.3 would require the future submission of a “final project layout plan.” [Draft](#)
28 [SCA](#) at 28.

1 The WDFW Guidelines for Wind Power Projects (Ex. 609c^[64]) recommend that
2 projects should be sited on highly disturbed and roaded areas with existing
3 transmission lines. (pp. 5 & 8 of Ex. 609c). The Whistling Ridge Project is
4 consistent with that approach since it occurs on a tract of industrial timberland that
has been heavily disturbed for many decades and has an extensive road system and
an existing transmission line bisecting the project.

5 [Order No. 868](#) at 24. The Council's beginning premise misconstrues the WDFW Guidelines and
6 is contrary to the Council's mandate and policy to avoid and minimize impacts to wildlife.
7 Friends asks the Council to reconsider this premise.

8
9 In order to avoid and minimize impacts from wind development, the WDFW Guidelines
10 direct wind developers to "[a]void high bird and bat aggregation areas, *and areas used by*
11 *sensitive status species.*" [Ex. 6.09c](#) at 5 (emphasis added). The Guidelines also "[e]ncourage the
12 protection of Priority Habitats and Species (PHS)," *id.*, a policy reflected in the Council's own
13 regulations, [WAC 463-62-040\(1\)](#) ("The council encourages applicants to select sites that avoid
14 impacts to any species on federal or state lists of endangered or threatened species or to priority
15 species and habitats."). And contrary to the Council's finding, the Guidelines provide that
16 facilities "should be" sited in disturbed areas and existing transmission corridors only as a
17 mitigation measure, when impacts are otherwise unavoidable. *See id.* at 8. In other words, even
18 disturbed lands should be developed *only after* all attempts are made to avoid impacts to
19 sensitive-status and priority species.

20
21 Here, the proposed Project would negatively affect several sensitive-status and priority
22 species, including golden eagles, Vaux's swifts, northern goshawks, pileated woodpeckers, and
23 olive-sided flycatchers.⁶⁵ Two priority species of bat, Keen's myotis and Townsend's big-eared
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25
26
27 ⁶⁴ This citation and the next quoted citation should be [Ex. 6.09c](#).

28 ⁶⁵ FEIS at 3-46; [Order No. 868](#) at 25.

bat, may also use the area, *id.*, though virtually nothing is known about potential impacts to these species.⁶⁶

Here, the Council's duty to first avoid and minimize impacts before deciding whether this is an appropriate site for a wind energy project is especially important. The flight patterns of at least two sensitive species place them at an elevated risk of collision. *See, e.g.*, FEIS at 3-57 (noting that Vaux's swifts and olive-sided flycatchers were often, if not exclusively, documented as flying within the rotor-swept zone, where the risk of collision is greatest).

Furthermore, sensitive species are found at the Project site in relatively high numbers as compared to other sites, despite their overall low population levels in the State of Washington. For example, the Applicant's witness Gregory Johnson testified that the Whistling Ridge site has a higher rate of use by olive-sided flycatchers than any other wind project proposed or approved in the entire Pacific Northwest. [Jan. 6, 2011 Tr.](#) at 697:4–7. In fact, despite the presence of commercial forestland at the proposed Coyote Crest and Radar Ridge wind facilities, *no* olive-sided flycatchers have been documented at those other project sites,⁶⁷ compared to the 27 olive-sided flycatchers observed at Whistling Ridge.⁶⁸ In addition, avian use studies for the Project have already documented Vaux's swifts 38 times more frequently⁶⁹ and northern goshawks 14

⁶⁶ *See* [Order No. 868](#) at 26; Ex. 31.00 at 11:8–12 (testimony of Don McIvor) (“Any stated affect [*sic*] on [bat] populations, which are unknown, is purely conjectural.”).

⁶⁷ Coyote Crest Final Environmental Impact Statement (“Coyote Crest FEIS”), [Appendix C](#), Tables 1 & 2 (Jan. 2009); [Wildlife Baseline Studies for the Radar Ridge Wind Resource Area, Pacific County, Washington: Final Report, April 15, 2008 – June 18, 2009](#) (2009), Table 10. The Whistling Ridge FEIS cites and relies on both of these bird survey reports. [FEIS at 3-287 \(Table 3.14-1\), 3-299.](#)

⁶⁸ Whistling Ridge FEIS at 3-57.

⁶⁹ At the Whistling Ridge site, the mean numbers of Vaux's swifts observed per twenty-minute survey, averaged across all seasons, was .115 birds per survey. *See* Whistling Ridge FEIS [Appx. C-4, Table 4](#). By contrast, the average frequency of observations of Vaux's swifts at the Kittitas Valley, Desert Claim, and Wild Horse facilities was only .003 birds per survey. *See* Kittitas Valley Wind Power Project

1 times more frequently⁷⁰ than at the Council's previously approved wind facilities. Finally,
2 witness Johnson testified about the high relative occurrence of pileated woodpeckers at the
3 Whistling Ridge site compared to other sites. [Jan. 6, 2011 Tr.](#) at 697:13–15.

4
5 Rather than start from the premise that the Guidelines encourage development on land used
6 by these species, the Council should avoid impacts to these species as its beginning premise. The
7 Council should reconsider its findings and conclusions regarding whether Whistling Ridge is an
8 appropriate site for a wind energy project.

9
10 **2. The Applicant bears the burden to supply required information on avian**
11 **usage of the project site *prior to the Council's recommendation*, which the**
Applicant has failed to do.

12 The Council's Adjudicative Order finds that

13 [a]pplicant's wildlife studies comply with the requirements of the WDFW
14 Guidelines and [WAC 463-60-362](#),^[71] Ex. 1.04r.^[72] Other parties urged additional
15 measures that add little additional protection, and failed to discredit the validity of
16 the studies used in the application.

17 [Order No. 868](#) at 38 (Finding/Conclusion No. 26).

18 First, this finding is based on the wrong standard of review. Intervenor's do not bear a
19 burden to "discredit" the validity of the Applicant's studies. Rather, "[t]he applicant has the
20 burden of demonstrating through its evidence that the Project meets the requirements of law,

21 ///

22
23 FEIS Environmental Impact Statement ("KV FEIS"), [Appx. A](#), Table 2 (Feb. 1, 2007) (summarizing bird
occurrences for all three projects in Kittitas County).

24 ⁷⁰ Mean observations of northern goshawks at the Whistling Ridge site was .028 birds per survey.
Whistling Ridge [FEIS Appx. C-4](#), Table 4. On average at the Kittitas County project sites, only .002
25 northern goshawks were observed per survey. KV FEIS, [Appx. A](#), Table 2.

26 ⁷¹ Friends assumes that the Council intended to cite [WAC 463-60-332](#) (Natural environment –
Habitat, vegetation, fish and wildlife), not [WAC 463-60-362](#) (Built environment – Land and shoreline
27 use). The Council should correct the error.

28 ⁷² Friends assumes that the Council intended to cite either [Ex. 1.02r](#) or [Ex. 1.20r](#) (involving
wildlife surveys) not [Ex. 1.04r](#) (involving a proposed mitigation parcel). This citation should be corrected.

1 consistent with the legislative policy and intent of RCW 80.50.” [Order No. 843](#) at 13 (Nov. 16,
2 2009).

3
4 Second, the WDFW Guidelines and Council rules provide clear direction for the
5 preparation of avian surveys, which the Applicant has not followed. In particular, the WDFW
6 Guidelines provide the following specific standards:

7 *A minimum of one full year of avian use surveys is recommended following*
8 *current protocols to estimate the use of the project area by avian species/groups of*
9 *interest during the major migratory seasons or season of most concern. This*
10 *information should be used to guide decisions regarding appropriate survey*
11 *intensity.*

12 *Two or more years of relevant data are recommended in the following cases: 1)*
13 *risk to avian groups of concern is estimated to be high, 2) there is limited or no*
14 *relevant data regarding seasonal use of the project site (e.g., data from nearby*
15 *areas of similar habitat type), and/or 3) the project is significantly diverse in*
16 *habitat and species. This additional avian use data should be collected to refine*
17 *impact predictions and make decisions on project layout.*

18 [Ex. 6.09c](#) at 4 (emphasis added). Similarly, the Council’s own rules call out specific periods of
19 the year that require particular attention: “[W]ildlife surveys shall be conducted during all
20 seasons of the year to determine breeding, summer, winter, migratory usage, and habitat
21 condition of the site.” [WAC 463-62-040\(2\)\(f\)](#); *see also* [WAC 463-60-332\(2\)\(d\)](#) (Applicant must
22 assess “[i]mpacts to . . . wildlife migration routes.”); [WAC 463-60-332\(2\)\(g\)](#) (Applicant must
23 assess risk of collision during migration periods.).

24 Here, the Applicant failed to comply with any of these requirements. Instead of two or
25 more years of surveys required for this site, or even the “full year” of surveys required in
26 general, the Applicant surveyed for only nine months.⁷³ As part of the Applicant’s failures, it
27 ///

28 ⁷³ See [Friends Adj. Op. Br.](#) at 43:9; [Friends Adj. Resp. Br.](#) at 18:21–19:7; FEIS at [3-60](#).

1 never surveyed during the key migratory period of July 14 through September 11.⁷⁴ And it failed
2 to perform any surveys during the entire migration period for the olive-sided flycatcher, during
3 which every member of that species within western Washington must migrate to South
4 America.⁷⁵

5
6 The Applicant's failure to perform any surveys during significant time periods not only
7 fails to satisfy the WDFW Guidelines, but also the requirements of the Council's own rules to
8 compile, analyze, and provide avian usage *prior* to a decision. Because the Applicant has failed
9 to meet the necessary requirements for site certification, the Council should not recommend
10 approval of the Project to the Governor.

11
12 **3. The Applicant has also failed to meet its burden to supply required**
13 **information on bat usage of the project site prior to the Council's**
14 **recommendation.**

15 By requiring additional bat surveys prior to commercial operation within the Draft SCA,
16 the Council implicitly recognizes that the Applicant has not gathered sufficient information to
17 understand or predict bat usage of the project site. *See Draft SCA* at 36 (Condition VI.E). The
18 Applicant's failures violate WAC [463-62-040\(2\)\(f\)](#) and [463-60-332\(2\)](#), which require the
19 Applicant to determine usage *prior to the Council's recommendation*.

20
21 For the same reasons as stated above with respect to birds, the Council should require
22 sufficient bat studies and give the parties an opportunity to evaluate the veracity of the
23 Applicant's surveys and predictions *before* the Council makes its recommendation.

24 ///

25
26 ⁷⁴ WDFW also noted that during this time period of late summer to early fall, the migration of
27 *juvenile* eagles, accipiters, and hawks is at its greatest, and that "[a]dult birds, obviously fewer in number,
28 will dominate counts after mid-September." [Ex. 6.08c](#) at 2.

⁷⁵ *See Friends Adj. Op. Br.* at 45:13-22; FEIS at [3-57](#).

1 **4. The Council should reconsider its findings on whether the Applicant should be**
2 **required to collect and analyze preexisting information on species abundance**
3 **and distribution.**

4 The Council's Adjudicative Order rejects arguments by Friends, Counsel for the
5 Environment, and Seattle Audubon⁷⁶ that the Applicant should be required to collect preexisting
6 information on species abundance and distribution:

7 Particularly given the relatively unique nature of the surrounding habitat as a
8 potential wind farm site, an abundance survey and a literature review (noted by
9 Audubon) may have been helpful. Their importance is not critical and their absence
 is not fatal, however.

10 Order No. 868 at 25. Friends asks the Council to reconsider this finding and require the
11 Applicant to gather and map preexisting information on species distribution and relative
12 abundance prior to its final decision.

13 The WDFW Wind Power Guidelines require an applicant to gather preexisting data on
14 species abundance and distribution in order to plan adequate wildlife surveys:

15 Existing information on species and potential habitats in the vicinity of the project
16 area should be reviewed and if appropriate, mapped. Sources of existing
17 information should include resource agencies, local experts, recognized databases
18 (e.g., Priority Habitats and Species database, Wildlife Program Wildlife Resources
19 Data System), and data gathered at other nearby wind facilities or other types of
20 projects. This information should be used to develop field and analysis protocols
 reviewed and approved by the WDFW.

21 Ex. 6.09c (WDFW Guidelines) at 3–4.

22 The Applicant has not complied with this part of the WDFW Guidelines. For example, the
23 Applicant's expert admitted that he never asked for wildlife information from the U.S. Forest
24 Service or the Washington Department of Natural Resources, despite the fact that both manage
25

26
27 ⁷⁶ Friends Adj. Op. Br. at 47:11–48:11, 49:24–51:9; Counsel for the Env't Br. at 5:11–6:3, 14:16–
28 22; Seattle Audubon Adj. Op. Br. at 3:17–5:5.

lands in the immediate vicinity of the Project. [Jan. 6, 2011 Tr.](#) at 701:6–7. The Applicant’s expert knew of the three other wind facilities proposed for Pacific Northwest forests, yet never looked at publicly available wildlife data from those projects. [Id.](#) at 699:8–702:8. And while the Applicant’s expert knew of a database containing distribution information for olive-sided flycatchers and Vaux’s Swifts, he did not consult that database. [Id.](#) at 710:16-19.⁷⁷ The Council should require the Applicant to comply with the WDFW Guidelines prior to a Council recommendation.

5. The Council should reconsider its findings that post-construction information and remedial mitigation are more beneficial to wildlife than supplying required information and avoiding impacts in the first place.

As discussed above, the Applicant failed to collect much of the required information necessary to determine wildlife usage of the Project site. Despite the Applicant’s failure, the Council makes the following finding:

Hazards to flying species (birds and bats) have been found to include striking or being struck by turbine blades and becoming disoriented or injured by the vortex of moving blades. *Post-construction mortality studies will provide greater benefit to wildlife preservation than preconstruction studies.* Adaptive management utilized through a Technical Advisory Committee will provide benefit by bringing appropriate interests and skills to studies and development of remedial measures.

[Order No. 868](#) at 38 (Finding/Conclusion No. 27) (emphasis added). In essence, the Council finds that building the WREP facility, studying its impacts, and then attempting to correct those

///

⁷⁷ Moreover, by failing to consult publicly available databases on wildlife distribution, and by failing to inquire into species communities on adjacent land, the Applicant failed to comply with the Council’s own rules. In particular, the application package “shall,” among other things, “provide a detailed description of habitats and species present on *and adjacent to* the project site.” [WAC 463-60-332\(1\)\(a\)](#) (emphasis added); *see also* [WAC 463-60-332\(2\)\(c\)](#) (applicant must assess impacts to adjacent wildlife communities). By not inquiring into the sources of information listed above, the Applicant has not provided the Council with sufficient information to predict impacts to local populations.

1 impacts would benefit wildlife more than requiring the very pre-decisional information that the
2 WDFW Guidelines and the Council's rules require. The Council should reconsider its finding.

3 The problem with the Council's approach is that information required by the Council's
4 rules and the WDFW guidelines to evaluate the Project's impacts (for example, information on
5 local bird populations during migratory periods) does not exist, and as a result of the Council's
6 approach will *never* exist.⁷⁸ Thus, the Council's decisions could not be based on substantial
7 evidence. The Council's approach also violates the requirements of its own rules for the
8 Application to contain specified information so that the Council may actually evaluate the
9 Project's impacts before those impacts occur. *See* [WAC 463-60-332\(2\)](#), [463-62-040\(2\)](#).

12 In addition, the Council's approach prevents the parties and the public from knowing
13 about wildlife use at the site and the Project's potential impacts until a future post-decisional
14 date, when it would be too late to decide whether the Project should be approved, for instance.
15 There is value in *both* pre-decisional information *and* post-construction monitoring information.
16 And *both* are required under the Council's rules and the WDFW Guidelines. The latter cannot
17 substitute for the former, and should not be deemed to provide "greater benefit," simply because
18 the former information has not been submitted as required. The Council should reconsider and
19 strike its finding, and ensure that the required pre-decisional information is submitted by the
20 Applicant.

23 ///

24 ///

26 ⁷⁸ In fact, the Council's draft conditions would *never* require future information about bird use at
27 and near the site, other than raptor use (Conditions No. IV.E.8, V.C.2) and direct mortality to birds
28 (Conditions No. V.C.1, V.C.3). The bigger picture—for instance local population sizes of specific bird
species or bird use during migratory periods—would forever be uncertain under the Council's approach.

1 **6. The Council should reconsider its findings regarding potential impacts to**
2 **northern spotted owls.**

3 Regarding potential impacts to northern spotted owls (“NSOs”), the Adjudicative Order
4 states only that the NSO observed near the project site is not likely to be physically injured by
5 colliding with the turbines. See [Order No. 868](#) at 25. However, Council regulations specifically
6 require the Applicant to assess “[i]mpacts due to any activities that may otherwise confuse, deter,
7 disrupt, or threaten fish and wildlife.” [WAC 463-60-332\(2\)\(f\)](#). During the adjudication, it
8 became clear that the consultation process under the federal Endangered Species Act was
9 premised on a number of factual inconsistencies.⁷⁹ The Applicant’s expert admitted that he did
10 not supply the U.S. Fish and Wildlife Service with all NSO-related data.⁸⁰ The Applicant’s
11 expert could not predict whether the project might have indirect effects on the NSO such as
12 inhibiting its ability to hunt.⁸¹ And the Washington Department of Natural Resources specifically
13 cautioned that the Project may interfere with NSO dispersal behavior.⁸² The Council should
14 reconsider and revise its findings regarding the potential impacts to northern spotted owls.
15
16

17 **7. The Council should reconsider its conflicting findings as to how many acres**
18 **the Project would affect.**

19 The Council should reconsider its conflicting statements as to how many acres the Project
20 would affect. The Council should clarify exactly how many acres would be affected by the
21 project, both permanently and temporarily, and how many acres necessitate mitigation.
22

23 For example, the Adjudicative Order states that the Project would cover 1,152 acres of
24 land, with 384 acres “permanently developed for placement of the turbine towers, access roads,
25

26 ⁷⁹ See [Friends Adj. Op. Br.](#) at 53:5-16.

27 ⁸⁰ [Id.](#) at 53 n. 20.

28 ⁸¹ [Id.](#) at 53:22–24.

⁸² [Ex. 1.16c](#) at 3.

1 substations, underground and overhead transmission lines, and an operations and maintenance
2 facility.” [Order No. 868](#) at 5. Yet, at one point the Recommendation Order describes the entire
3 project as 115 acres in size. [Order No. 869](#) at 1. At another point, the Recommendation Order
4 states that “50 acres are needed for the permanent footprint of the proposed turbines and support
5 facilities, with about 50 additional acres temporarily affected.” *Id.* at 3. At yet another point, the
6 Recommendation Order states that about 100 acres would be temporarily affected, plus a
7 “permanent facility footprint” of about 50 acres. *Id.* at 13. And at yet another point, the
8 Recommendation Order places the permanent footprint closer to 60 acres, including new roads.
9 *Id.* at 10.

12 Moreover, the Council’s Orders do not mention the Applicant’s plan to permanently clear
13 a fifty-foot radius surrounding each turbine.⁸³ The Orders fail to note that trees would likely be
14 permanently cleared to accommodate overhead transmission lines.⁸⁴ Nor do the orders
15 acknowledge the Applicant’s plan to place height restrictions on hundreds of acres of forestland
16 to provide wind clearance outside the fifty-foot radius described above, reducing the height of
17 the trees to as little as fifteen feet, which the Applicant might achieve through frequent clearcuts
18 or replacing forested habitat with grass or shrubs.⁸⁵ In each instance, habitat would be
19 permanently lost to wildlife communities, and mitigation is required. *See* [WAC 463-62-040\(2\)\(c\)](#)
22 (“Mitigation credits and debits shall be based on a scientifically valid measure of habitat,
23 function, value, and area.”). As discussed below, the Council has seemingly ignored the impacts
24 within these areas when discussing required mitigation.

27 ⁸³ *See* Amended Application at 2.3-9, fig. 2.3-4.

28 ⁸⁴ *See* [Ex. 1.00](#) at 10:11–14.

⁸⁵ *See* Amended Application at 2.3-9, fig. 2.3-4; [Ex. 1.00](#) (testimony of Jason Spadaro) at 10:1–4.

1 **8. The Council’s findings, conclusions, and conditions regarding wildlife**
2 **mitigation measures would violate the Council’s rules and deprive the parties**
3 **and public of their rights to evaluate and present evidence on the adequacy of**
4 **any proposed measures.**

5 The Council proposes to delay the Applicant’s preparation of a Habitat Mitigation Plan for
6 the Project until *after* the Governor renders a decision on the Project. [Draft SCA](#) at 20–21
7 (Condition No. IV.E.1). This approach would violate the Council’s rules, which state that “[t]he
8 *application shall* include a detailed discussion of mitigation measures, including avoidance,
9 minimization of impacts, and mitigation through compensation or preservation and restoration of
10 existing habitats and species, proposed to compensate for the impacts that have been identified.”
11 [WAC 463-60-332\(3\)](#). As plainly stated in the rule, this information must be *in the Application*.
12 The Applicant has not complied with this requirement, and the Council’s approach of deferring
13 compliance with the rule would only exacerbate the violation by depriving the parties and the
14 public of any ability to evaluate and present evidence on the adequacy of the proposed measures.

15 Moreover, draft condition IV.E.1, entitled “Habitat Mitigation Plan,” appears to focus
16 exclusively on the future provision of a “mitigation parcel” (or the payment of a fee equivalent to
17 the monetary value of “permanently disturbed” project areas⁸⁶) to comply with wildlife

21 ⁸⁶ This option is inadequate because it focuses only on permanently *disturbed* areas, a limitation
22 not found in the WDFW Guidelines or the Council’s own rules. Instead, the WDFW Guidelines require
23 mitigation for permanent *impacts*, which the WDFW Guidelines define as those impacts “that are
24 anticipated to persist and cannot be restored within the life of the project.” Ex. 6.09c at 9. Here, by
25 focusing on permanently disturbed areas, the Council ignores permanent impacts in other areas such as
26 the locations where trees would be periodically logged and kept at a height less than maturity in order to
27 facilitate wind flow. See Amended Application at 2.3-9, fig. 2.3-4; FEIS at 2-15. The Council also ignores
28 areas where trees may be replaced with grass or shrubs. See Ex. 1.00 at 10:1-4. Mitigation for these areas
is also required by the Council’s own rules, which require the Applicant to “demonstrate no net loss of
habitat function and value.” [WAC 463-62-040\(2\)\(a\)](#) (emphasis added). And at the very least, these areas
represent significant temporary impacts in need of mitigation because the land would not be returned “to a
condition *at least as good as* its pre-project condition.” Ex. 6.09c (WDFW Guidelines) at 11 (emphasis
added).

1 mitigation requirements. [Draft SCA](#) at 20–21. According to the Council, this would “satisfy [the
2 Applicant’s] Mitigation Obligation.” The draft condition, however, ignores numerous
3 requirements of the Council’s rules applicable to mitigation plans, such as the Applicant’s duty
4 to address “avoidance” and “minimization of impacts,” “[a]ddress all best management practices
5 to be employed,” “[a]ddress how cumulative impacts associated with the energy facility will be
6 avoided or minimized,” and “[d]emonstrate how the mitigation measures will achieve equivalent
7 or greater habitat quality, value and function for those habitats being impacted.” [WAC 463-60-](#)
8 [332\(3\)](#). The draft condition is a case of too little, too late. The condition would not suffice for
9 compliance with the Council’s rules requiring information to be submitted in the Application and
10 reviewed by the Council prior to a decision.⁸⁷

13 As for the parcel in Klickitat County proposed by the Applicant as a mitigation parcel via
14 rebuttal testimony from Mr. Spadaro, a non-expert on wildlife issues, the Council’s Orders
15 contain conflicting statements regarding this parcel’s relevance to the proceedings. For example,
16 the Council states that it will not make any findings on the adequacy of the Klickitat County
17 parcel. *See* [Order No. 868](#) at 2 n. 2; *id.* at 27. Yet elsewhere the Council seems to accept the
18 Klickitat parcel as adequate: “*The council concludes that . . . the mitigation parcel discussed in*
19 *the record is appropriate and may be accepted.*” [Order No. 868](#) at 38 (Finding/Conclusion No.
20 29) (first emphasis in original; second emphasis added). Furthermore, the Council seems to
21 suggest that the Klickitat parcel has been found to contain habitat superior to that at the
22 Whistling Ridge site. *See id.* at 1–2 (“A *suggested* mitigation parcel may satisfy applicable
23
24
25

26
27 ⁸⁷ Friends also notes that the options given in the draft condition are unnecessarily restricted to the
28 Applicant either purchasing a *new* parcel or donating money or fees, thus not permitting the Applicant to
donate land it *already owns*. *See* [Draft SCA](#) at 21 (Condition IV.E.1.c).

1 mitigation standards *inasmuch as* it provides a habitat superior to a commercial forest habitat.”)
2 (emphasis added), 27 (similar statement).⁸⁸ Finally, at the October 6, 2011 public meeting, it was
3 reported that the Council “considered and favorably regarded” the Klickitat parcel. Oct. 6, 2011
4 Evening Sess. Tr. at 5:9 (remarks of Mr. Wright).

5
6 The Council should clarify what role the Klickitat parcel has played in the Council’s
7 deliberations and decision. And to the extent that the Council chooses (either now or later) to
8 evaluate the Klickitat parcel or any other parcel as potentially satisfying the Applicant’s
9 mitigation obligations, the parties and the public must be given an opportunity to participate in
10 the evaluation and present evidence. Otherwise, the parties will have been deprived of their right
11 to submit evidence and rebuttal testimony on the mitigation parcel and its compliance with the
12 Council’s rules and WDFW Guidelines, in direct contravention of [RCW 34.05.449\(2\)](#) (“[T]he
13 presiding officer shall afford to all parties the opportunity to respond, present evidence and
14 argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a
15 limited grant of intervention or by the prehearing order.”).

16
17
18 **9. The Council should revise the draft conditions of approval regarding wildlife.**

19 In the event that the Council chooses to recommend certification of the Project despite the
20 deficiencies and violations discussed above, Friends requests the following amendments to the
21 draft conditions of approval in the Draft SCA.

22
23 First, the draft SCA provides that the mitigation parcel shall be judged by “the mitigation
24 ratios specified in the 2009 WDFW Wind Power Guidelines.” [Draft SCA](#) at 21 (Condition
25

26
27 ⁸⁸ This statement is at the very least ambiguous because “inasmuch as” may mean either “to such
28 a degree as” or “in view of the fact that.” *Webster’s Unabridged Dictionary*. The Council should clarify
whether it finds that the proposed parcel *may* or *will* provide superior habitat.

1 IV.E.1.b). However, the WDFW Guidelines do not contain clear mitigation ratios for
2 commercial forestland. See Ex. 6.09c at 19. On the other hand, the Council’s rules flatly provide
3 that “[t]he ratios of replacement habitat to impacted habitat *shall be* greater than 1:1 to
4 compensate for temporal losses, uncertainty of performance, and differences in functions and
5 values.” WAC 463-62-040(2)(d) (emphasis added). Accordingly, the Council should amend the
6 Draft SCA to clarify that any compensation mitigation must exceed a 1:1 ratio of replacement
7 habitat to impacted habitat.
8

9
10 To clarify the impacted areas to be used in calculating the mitigation ratio, Condition
11 IV.E.1.b of the Draft SCA should be amended as follows:

12 The Habitat Mitigation Plan will specify the Certificate Holder's Mitigation
13 Obligation. The Certificate Holder's Mitigation Obligation will be calculated using
14 the mitigation ratios specified in the 2009 WDFW Wind Power Guidelines, and
15 shall, at a minimum, provide mitigation at greater than a 1:1 ratio. For purposes of
16 calculating the Mitigation Obligation, expected habitat impacts will be determined
17 based upon the pre-construction Project Layout drawings and the habitat types
18 shown on the Habitat Map. Pre-construction Project Layout drawings will show
19 expected permanent and temporary land disturbances. All impacted areas, including
20 roads and other areas cleared of trees for the duration of the Project, and any area
21 placed on a more frequent cut cycle or otherwise impacted as a result of the Project,
22 shall be included for purposes of calculating the Mitigation Obligation.

23 Second, Friends requests that the Draft SCA be amended to require the post-construction
24 studies to not only address direct wildlife mortality through collisions, but also the extent of
25 wildlife displacement. Operation of other wind facilities has resulted in substantial reduction in
26 avian use of surrounding areas; such displacement represents a loss of habitat function and
27 value.⁸⁹ Under the Draft SCA, the Applicant must provide additional mitigation if actual impacts
28 exceed expected impacts. Draft SCA at 21 (Condition IV.E.1.d). Monitoring for impacts through

⁸⁹ See Friends Adj. Op. Br. at 58–59; Amended Application at App. B-6 p. 7; Ex. 22.00 at 25:19–26:6; Ex. 6.04r at 29.9–10.

1 wildlife displacement would enable the Council to determine when such impacts are exceeded.

2 Friends recommends adding the following provision to condition VI.C (“Post-Construction
3 Avian Monitoring Plan”):
4

5 The Certificate Holder shall perform three years of post-construction monitoring
6 and surveys, designed in consultation with WDFW and the TAC, to document and
7 quantify any wildlife displacement resulting from the Project. (Draft SCA at 35)

8 Third, the Draft SCA should be amended to require post-construction surveys for northern
9 spotted owls (“NSOs”) for three years, within two miles of the Project site, given the extremely
10 rare status of the NSO, the fact that an NSO was recently detected multiple times in the vicinity
11 of the Project site, and the fact that the Project site overlaps with two designated territorial owl
12 circles. Accordingly, the following changes should be made to draft condition of approval

13 VI.C.2:

14
15 For raptors other than northern spotted owls (NSOs), the Certificate Holder shall
16 perform a minimum of two breeding season’s raptor nest survey of the Project
17 Area, including a 1 mile buffer, to locate and monitor active raptor nests
18 potentially affected by construction and operation of the Project. For NSOs, the
19 Certificate Holder shall perform a minimum of three breeding season’s nest
20 survey of the Project Area, including a 2 mile buffer, to locate and monitor active
21 NSO nests potentially affected by construction and operation of the Project. (Draft
22 SCA at 35)

23 Fourth, the Adjudicative Order states that the Applicant will be required to design a project
24 layout that avoids avian and bat flight paths and impacts to feeding and nesting areas. *See Order*
25 *No. 868* at 27; *see also id.* at 38 (Finding/Conclusion No. 28). The Draft SCA, however, does not
26 appear to include any such requirements. To comply with the Adjudicative Order, the following
27 provision should be added to proposed Condition IV.L:

28
29 9. Certificate Holder shall site WTGs so that they do not interfere with avian
30 or bat flight patterns, feeding areas, or nesting areas. (Draft SCA at 29)

1 Fifth, as discussed above under scenic impacts, the Council should require the Certificate
2 Holder to ensure that turbine blades are locked when not generating electricity. Not only would
3 this requirement help reduce scenic impacts, it is an available and reasonable measure to reduce
4 adverse wildlife impacts caused by avian and bat collision with turbine blades. As expert witness
5 Dr. Smallwood testified, reducing blade spin-time is one of the few proven measures to reduce
6 avian impacts, short of shutting down or relocating turbines. *See* [Ex. 21.00](#) at 32:12–20. The
7 Council must “ensure through available and reasonable methods” that energy facilities “will
8 produce minimal adverse effects on the environment, ecology of the land and its wildlife.” [RCW](#)
9 [80.50.010](#). Therefore, Friends urges the Council to include this requirement in any SCA to
10 reduce both wildlife and scenic impacts.
11

12
13 Finally, the Draft SCA provides that the Technical Advisory Committee shall include a
14 designee of “Audubon Washington or its member chapters.” [Draft SCA](#) at 24 (Condition
15 IV.E.7). This conflicts with the Adjudicative Order, which specifically recommends “a
16 representative of Seattle Audubon Society as a member of the TAC,” rather than any chapter of
17 Audubon Washington. [Order No. 868](#) at 26. Friends asks the Council to amend the draft
18 condition to make it clear that the TAC shall include Seattle Audubon or its designee. Seattle
19 Audubon has been actively involved in this adjudication, and the TAC would benefit from its
20 particularized knowledge and expertise.
21

22
23 **E. The Council has apparently failed to ensure compliance with [WAC 463-30-093](#),**
24 **which (1) requires the Council to separate the adjudicative issues for purposes of**
25 **discussion and voting, and (2) limits the participation of the County’s appointee.**

26 Pursuant to [RCW 80.50.030\(4\)](#), Skamania County appointed Doug Sutherland as its
27 representative to the Council. Unlike all other Council members, Mr. Sutherland’s participation
28

1 in the adjudicative process is limited pursuant to [WAC 463-30-093](#):

2 **[WAC 463-30-093](#) Participation by county, city and port district**
3 **representatives.** In any adjudicative site certification proceeding, designated
4 council members representing local jurisdictions may discuss and, if authorized,
5 vote only on issues affecting their jurisdictions. Issues shall be separated for
6 purposes of discussion and voting.

7 This provision requires the Council to separate issues affecting Skamania County from issues not
8 affecting Skamania County. The County's representative may discuss and vote only on issues
9 affecting Skamania County.

10 It appears that the Council completely disregarded the requirements of [WAC 463-30-093](#).
11 There is nothing in either of the Council Orders that reflect compliance with the rule.
12 Furthermore, Council Member Sutherland voted on both Orders in their entirety, in apparent
13 violation of the rule.

14 For the same reasons as set forth in the Objection filed by Intervenors Friends of the
15 Columbia Gorge, Inc. and Save Our Scenic Area, the Council should reinstitute deliberations for
16 discussion and voting in a manner consistent with [WAC 463-30-093](#).

17
18 **F. The Council should address internal conflicts and omissions within and between the**
19 **Council's Orders and Draft SCA.**

20 **1. The Council should generally address internal conflicts and omissions.**

21 As discussed throughout this Petition, there are a number of conflicts and omissions within
22 and between the Council's Orders and Draft SCA. The Council should address the points raised
23 in this Petition.

24 Friends' Petition may not identify all such conflicts and omissions. For the benefit of the
25 parties and the public, the Council should generally address conflicts and omissions in advance
26
27
28

1 by explaining how its Orders (and any decision by the Governor) fit into the “Order of
2 Precedence” listed on page 17 of the [Draft SCA](#).

3 In addition, the “Order of Precedence” lists *state* statutes and regulations higher in
4 precedence than *federal* statutes and regulations. This order should be reversed. *See Crosby v.*
5 *Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“A fundamental principle of the
6 Constitution is that Congress has the power to preempt state law. . . . And even if Congress has
7 not occupied the field, state law is naturally preempted to the extent of any conflict with a federal
8 statute.”) (citations omitted).
9

10 Friends recommends the following changes to the “Order of Precedence” section on page
11 17 of the [Draft SCA](#):
12

13 **L. Order of Precedence**

14 In the event of an inconsistency or apparent ambiguity in this Agreement, the
15 inconsistency or ambiguity shall be resolved by giving precedence in the
16 following order:

- 17 1. Applicable ~~Federal State of Washington~~ statutes and regulations;
- 18 2. Applicable State of Washington ~~Federal~~ statutes and regulations;
- 19 3. The body of this Site Certification Agreement, including any other
20 provision, term or material incorporated herein by reference or otherwise
21 attached to, or incorporated in, this Site Certification Agreement;
- 22 4. The Governor’s Decision dated XXX;
- 23 5. The Council’s Order No. XXX (Order and Report to the Governor
24 Recommending Approval of Site Certification in Part, on Condition)
- 25 6. The Council’s Order No. XXX (Adjudicative Order Resolving Contested
26 Issues)
- 27 7. Representations in Applicant’s testimony and exhibits in the adjudicative
28 proceeding in this matter;

1
2 8. The application of common sense to effect a result consistent with law and
3 the principles effected in this document.

4 **2. The Council should revise the language in the Draft SCA regarding the**
5 **duration of Project construction.**

6 The Council's Recommendation Order succinctly states that "[C]onstruction of the entire
7 Project shall be completed within eighteen (18) months after beginning construction." [Order No.](#)
8 [869](#) at 18 (Finding/Conclusion No. 40).

9 The Draft SCA, however, conflicts with the Recommendation Order by not making this
10 eighteen-month period binding, instead referring to the Certificate Holder's "intention" regarding
11 the construction time period:

12
13 However, providing that such construction is not delayed by a *force majeure*
14 event, and that the construction schedule that the Certificate Holder submits
15 pursuant to Article IV.K of this Agreement demonstrates its intention and good
16 faith basis to believe that construction shall be completed within eighteen (18)
17 months of beginning Construction.

18 [Draft SCA](#) at 8.

19 The above-quoted language in the Draft SCA should be replaced with the following
20 language, taken largely from the Council's Recommendation Order:

21 Unless construction is delayed by a *force majeure* event, construction of the entire
22 Project shall be completed within eighteen (18) months after beginning
23 construction.

24 **3. The Council should include conditions addressing the expected lifetime of the**
25 **Project and potential "repowering" of the Project.**

26 If approved and built, the Whistling Ridge Energy Project should not be expected to last
27 forever, especially not as initially built. Multiple factors will change over time, including the
28

///

1 physical condition of the turbines, the status of energy markets, available technology,
2 environmental conditions, and community values.

3 The Application states that the expected lifetime of the Project is “at least 30 years,” which
4 is typical for modern wind energy projects in the region. Amended Application at 2.3-3, 2.3-12.
5 The Application also implies that at the end of that lifetime, the Applicant may wish to
6 “repower” the Project “by upgrading equipment with more efficient turbines.” *Id.* at 2.3-12.
7

8 Rather than granting certification to operate in perpetuity, any SCA for this Project should
9 specify a reasonable time period for the Project’s lifetime and require affirmative Council
10 renewal at the end of that time period. In addition, the SCA should address potential repowering
11 of the Project. Friends recommends adding the following conditions of approval:
12

13 **Project Lifetime**

14 Site certification for the Project is granted for a period of thirty (30) years from
15 the date of Substantial Completion. If Certificate Holder wishes to operate the
16 Project beyond that thirty-year time period, it shall file an application with the
17 Council for renewal of site certification no later than eighteen (18) months prior
18 to the expiration of the thirty-year time period, and the Council shall conduct a
hearing pursuant to RCW 34.05 to review and act on such application.

19 **Repowering**

20 If at any time Certificate Holder wishes to replace constructed individual WTGs
21 within the Project, it shall file an application with the Council for turbine
22 replacement, and the Council shall conduct a hearing pursuant to RCW 34.05 to
review and act on such application.

23 **4. The Council should ensure that any relocations of individual turbines outside of**
24 **their respective corridors undergoes public review.**

25 Proposed Condition of Approval No. I.C specifies that

26 [t]he final location of the WTGs and other project facilities within the Project
27 Area may vary from the locations shown on the conceptual drawings in the
28 Revised Application, but shall be consistent with the conditions of this Agreement

1 and in accordance with the final construction plans approved by EFSEC pursuant
2 to Article IV.L.⁹⁰

3 [Draft SCA](#) at 9. “Project Area” is, in turn, defined as “the approximately 1150 acre property
4 identified in Attachment 1.” *Id.* at 13. Under the Council’s recommendation, turbines would be
5 prohibited in specified locations in the vicinity of the A1–A7 and C1–C8 turbines. [Order No. 869](#)
6 at 13 n. 23. But apparently, pursuant to draft condition I.C, *all other locations* within the 1,150-
7 acre “Project Area” are potentially on the table as new sites where turbines could be relocated.

9 Friends is not outright opposed to the concept of relocating turbines within the Project
10 Area. After all, relocating turbines could reduce scenic, wildlife, noise, or other impacts. But any
11 changes to turbine siting that would involve moving a turbine outside of its specified corridor
12 should be subjected to public review. Otherwise, a relocation could result in *greater* impacts to
13 resources, and the resulting layout would be different from what was presented to and reviewed
14 by the public. The Applicant was very clear during the adjudication that it was proposing turbine
15 corridors and was not seeking to move individual turbines outside the specified corridors:
16

17 [W]e are not seeking [approval] for individual turbine locations. We’re seeking
18 corridors and if in micro-siting we want to find that ideal spot for a turbine *it has*
19 *to be within those corridors where we have the site certificate approval to do so.*

20 [Jan. 3, 2011 Tr.](#) at 159:4–8 (testimony of Jason Spadaro) (emphasis added).

21 To allow relocations of turbines outside of their corridors could result in an entirely new
22 Project. To protect the rights of the public regarding any such changes to the Project layout, the
23 Council should add the following language to proposed Condition of Approval No. I.C:

24 [t]he final location of the WTGs and other project facilities within the Project
25 Area may vary from the locations shown on the conceptual drawings in the
26

27 ⁹⁰ Condition IV.L.3 would require the Certificate Holder to “provide a final project layout plan.”
28 [Draft SCA](#) at 28.

Revised Application, but shall be consistent with the conditions of this Agreement and in accordance with the final construction plans approved by EFSEC pursuant to Article IV.L, except that any relocation of individual WTGs outside of their respective corridors shown in the Revised Application shall require a public hearing and decision by EFSEC.

5. The Council should remove the proposed time limitation on the Council's authority to address unexpected impacts from individual turbines.

If individual turbines cause unanticipated harm to the environment, the Council needs to have full authority to address these impacts. Proposed condition VII.H in the Draft SCA would address this potentiality by expressly giving the Council authority to require permanent shutdown, decommissioning, and/or removal of individual turbines from the Project area. [Draft SCA](#) at 38.

The problem, however, is that proposed condition III.K.5 would seemingly allow the Council to impose conditions in such circumstances for no more than 180 days. *See* [Draft SCA](#) at 17. There is no reason to limit the duration of such conditions to 180 days, especially when proposed condition VII.H would allow *permanent* conditions, including the removal of specific turbines. *See* [Draft SCA](#) at 38.⁹¹

The Council should retain its full authority to address unanticipated harm to the environment. Accordingly, the Council should delete the following sentence from condition III.K.5 on page 17 of the [Draft SCA](#):

~~Such additional conditions or requirements initially shall be effective for not more than ninety (90) days, and may be extended once for an additional ninety (90) day period if deemed necessary by EFSEC to pursue ongoing, or continuing temporary, arrangements under other authority, including but not limited to RCW 34.05, RCW 80.50 RCW [sic] or Title 463 WAC.~~

⁹¹ Adding to the potential confusion, the condition on permanent conditions cross-incorporates the condition imposing the 180-day time limit. [Draft SCA](#) at 38 ("In accordance with Article III, Section K, paragraph 5, of this agreement . . .").

1
2 **6. The Council should supplement and revise the conditions in the Draft SCA**
3 **involving road and transportation issues.**

4 The Council made several findings and conclusions regarding road and transportation
5 issues in its Adjudicative Order that were not, but should be, included in the Draft SCA. The
6 following language from the Adjudicative Order should be added to the conditions on page 25 of
7 the Draft SCA:

- 8
- 9 • “[T]ransportation must be lawfully accomplished according to the applicable standards
10 current at the time of transportation.” (Order No. 868 at 29)
 - 11 • Public Road Access. “Prior to beginning construction, Applicant must prepare and
12 present for approval contingency plans for maintaining access in the event of an
13 unexpected circumstance blocking public road access. . . . Transportation on local public
14 roads must be coordinated with appropriate local officials and must involve Applicant or
15 county consultation with schools, emergency services, and other potentially affected
16 interests.” (Order No. 868 at 39)
 - 17 • “Private roads for internal access within property owned by or under the control of
18 Applicant or an affiliate must be improved as needed to carry required loads safely.”
19 (Order No. 868 at 39)
 - 20 • Applicant must “verify carriers’ possession of appropriate permits for transportation on
21 Washington roads.” (Order No. 868 at 39)

22 In addition, the Council should modify the language of proposed condition IV.F.5 on page
23 26 of the Draft SCA to include the following language, taken verbatim from pages 29 and 39 of
24 the [Adjudicative Order](#):

- 25
- 26 • “Oversize or Overweight Hauls. The Certificate Holder shall notify EFSEC, at the
27 earliest time possible, of any permits or approvals required to conduct oversize or
28 overweight hauls. To the extent that long, wide, and/or overweight loads are involved,
permits must be obtained and their terms complied with. If components requiring loads
exceeding 150 feet in length are selected, Applicant must verify that such loads may be
lawfully delivered on existing roads within the National Scenic Area without road
construction or improvement, or must select smaller components.

///

1 **7. The Council should add a condition in the Draft SCA to address the Project’s**
2 **noise during operation.**

3 The Draft SCA includes a condition of approval to address noise from Project
4 construction, but no condition to address noise from the operation of the proposed wind turbines.
5 Friends recommends adding the following condition of approval to any SCA, which is verbatim
6 the same language used by the Council for the Kittitas Valley Wind Project:
7

8 Thirty (30) days prior to the beginning of site preparation the Certificate Holder
9 shall submit to EFSEC for review the modeling of noise impacts from the project
10 in its final layout and accounting for the specific WTG components selected.

11 Such a condition is particularly important for the Whistling Ridge Project, because the Applicant
12 has not yet selected the model and size of turbines it would be using for the Project, and also has
13 not yet determined the final Project layout.

14 **8. The Council should add a condition to the Draft SCA to ensure that no portion**
15 **of the Project is sited within the Columbia River Gorge National Scenic Area.**

16 The Applicant has proposed to site turbine F1 immediately adjacent to the boundary of the
17 Columbia River Gorge National Scenic Area (“NSA”), and portions of the proposed cleared
18 corridors for the “D” and “F” turbine arrays may extend into the NSA. *See Ex. 1.11C.* Federal
19 and interstate law prohibit the siting of new commercial energy facilities within the NSA.⁹² The
20 public has raised concerns about the proximity of the proposed turbines to the NSA boundary.
21

22 Adj. Pub. Comm. No. 359 (Comment of Chris Lloyd). The Council should add a condition⁹³ to
23 the Draft SCA to address this issue, such as the following language:

24 Certificate Holder shall ensure that all portions of the Project, including all WTG
25 blades and all forest practice activities for the Project, are located outside the
26 boundary of the Columbia River Gorge National Scenic Area.

27 ⁹² See 16 U.S.C. § 544d(d)(6); SCC §§ 22.04.010(88)(d), 22.10.020(A).

28 ⁹³ Such a condition would probably be best located in section I.C.6 (“Turbine Setbacks”).

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Furthermore, for the many reasons previously articulated in Friends' prior comments, testimony, and pleadings, the Application for site certification should be denied.

REEVES, KAHN, HENNESSY & ELKINS

/s/ Nathan J. Baker

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Staff Attorney for Intervenor Friends
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Exhibits

FILED
SUPERIOR COURT

2007 MAY -2 P 4: 27

COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

COLUMBIA RIVERKEEPER, a Washington nonprofit corporation, and PETER HUTALA, an Oregon resident,

Petitioner,

vs.

COWLITZ COUNTY, et al.

Respondents.

No. 07-2-00400-0

ORDER

THIS MATTER HAVING come on regularly for hearing before the above-entitled Court, and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED:

The opinion letter of Mike Wojtowicz dated February 13, 2007 is an interpretive decision which is a final decision under RCW 30.70C.020. However, RCW 30.70C.040 is superseded and pre-empted by RCW 80.50.110. Therefore, the defendants' motions to dismiss are granted.

DATED:

5/2/07

Superior Court Judge

ORDINANCE 2011-03

(AN ORDINANCE TO EXTEND A MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF ANY BUILDING, MECHANICAL, AND/OR PLUMBING PERMITS ON ANY PARCEL OF LAND THAT IS 20 ACRES OR LARGER THAT WAS CREATED BY DEED SINCE JANUARY 1, 2006, THE ACCEPTANCE AND PROCESSING OF LAND DIVISIONS (SUBDIVISION AND SHORT SUBDIVISION), AND THE ACCEPTANCE AND PROCESSING OF STATE ENVIRONMENTAL POLICY ACT (SEPA) CHECKLISTS RELATED TO FOREST PRACTICE CONVERSIONS FOR ANY PARCEL LOCATED WITHIN UNINCORPORATED SKAMANIA COUNTY THAT IS NOT CURRENTLY LOCATED WITHIN A ZONING CLASSIFICATION OR THE AREA GENERALLY KNOWN AS THE SWIFT SUBAREA OF SKAMANIA COUNTY.)

WHEREAS, the Board of County Commissioner adopted the 2007 Comprehensive Plan on July 10, 2007; and,

WHEREAS, the Board of County Commissioner, on December 30, 2008, extended for the third time, the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, on July 28, 2009, the Board of County Commissioners re-established the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, Skamania County is in the process of updating zoning classification for all land within unincorporated Skamania County to be consistent with the adopted Comprehensive Plan or adopted Subarea Plans; and,

WHEREAS, there are over 15,000 acres of private land within unincorporated Skamania County that do not have zoning classifications; and,

WHEREAS, most of the area within unincorporated Skamania County that is not currently covered by a zoning classification is currently used as commercial forest land or within the Gifford Pinchot National Forest; and,

WHEREAS, the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses; and,

WHEREAS, since January 1, 2006, over 230 new parcels (20 acres or larger) have been created through the deed process, which is exempt from the subdivision and short subdivision (short plat) regulations and other environmental review processes; and,

WHEREAS, several comments submitted during the public comment periods related to the draft Comprehensive Plan and the draft Swift Subarea Plan expressed concern on the number of exempt parcels that have been created since the planning process began and that the exempt parcels do not have any level of review related to critical resource protection, design standards, road maintenance, stormwater or other checks and balances required for residential lots created through the subdivision or short subdivision (short plat) process; and,

WHEREAS, these new exempt parcels are located in existing forest land areas that during the review process of the Comprehensive Plan and pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act; and,

WHEREAS, allowing new construction on these parcel created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare; and,

WHEREAS, the development within many locations of unincorporated Skamania County, outside of the areas with zoning classifications is located on rugged mountainous terrain, is only accessed through United States Forest Service Roads and private roads, and does not currently have access to electrical power service, land-line telephone service and cellular telephone service; and,

WHEREAS, continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events; and,

WHEREAS, during the visioning process of the Comprehensive Plan information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development; and,

WHEREAS, the Board of County Commissioners having provided proper notice in the official newspaper of general circulation and with a quorum present, conducted a public hearing to consider extending the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County for six months; and,

WHEREAS, after all those attending the hearing were given the opportunity to speak; the public hearing was closed to public testimony; and,

WHEREAS, the Board of County Commissioners has the authority pursuant to RCW 36.70.795 to

adopt a moratorium without holding a public hearing (as long as a public hearing is held on the adopted moratorium within at least 60 days of its adoption) and whether or not there is a recommendation on the matter from the Planning Commission or the Community Development Department, that may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such longer period. A moratorium may be renewed for one or more six-month period(s) if a subsequent public hearing is held and finding of fact are made prior to each renewal; and,

WHEREAS, a work plan for the zoning classification process has been developed; and,

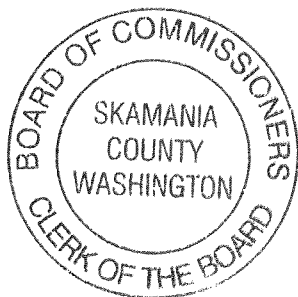
WHEREAS, the Board of County Commissioners finds a sufficient basis to extend the moratorium, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the newly adopted 2007 Comprehensive Plan; and,

WHEREAS, the Board of County Commissioners intends for these recitals to constitute its "findings of fact" as required by RCW 36.70.795; and,

NOW, THEREFORE BE IT HEREBY ORDAINED AND ESTABLISHED BY THIS BOARD OF COUNTY COMMISSIONERS AS FOLLOWS: the Board of County Commissioners hereby adopts Ordinance 2011-03 to extend for six months the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

ACKNOWLEDGED IN REGULAR SESSION this 24th day of May 2011 and set for public hearing on the 14th day of June 2011 at 5:30 PM.

**BOARD OF COUNTY COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON**



[Signature]
Chairman

[Signature]
Commissioner

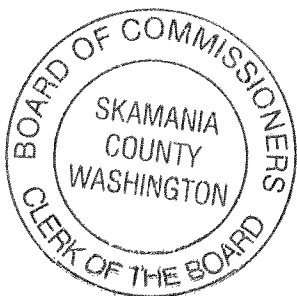
[Signature]
Commissioner

ATTEST:

[Signature]
Clerk of the Board

ORDINANCE NO. 2011-03 IS HEREBY PASSED INTO LAW THIS 14th DAY OF JUNE 2011.

**BOARD OF COUNTY COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON**



[Signature]
Chairman

[Signature]
Commissioner

[Signature]
Commissioner

ATTEST:


[Signature]
Clerk of the Board

APPROVED AS TO FORM ONLY:

[Signature]
Skamania County Prosecuting Attorney

AYE 3
NAY _____
ABSTAIN _____
ABSENT _____

COMMISSIONER'S AGENDA ITEM COMMENTARY

<u>SUBMITTED BY</u>	Community Development Department	 Signature
<u>AGENDA DATE</u>	May 18, 2011	
<u>SUBJECT</u>	Extend six month moratorium on County wide unzoned land.	
<u>ACTION REQUESTED</u>	Public Hearing on June 14, 2011 and ordinance adoption.	

SUMMARY/BACKGROUND

On July 10, 2007, the Board of County Commissioners adopted Ordinance 2007-10 establishing a moratorium for six months on the acceptance and processing of building, mechanical, and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

The moratorium was extended for six months by the adoption of Ordinance 2008-01 on January 8, 2008, Ordinance 2008-08 on July 3, 2008, Ordinance 2008-13 on December 30, 2008, Ordinance 2010-01 on January 26, 2010, Ordinance 2010-06 on July 7, 2010, and Ordinance 2010-10 on December 28, 2010.

The moratorium was re-established on December 28, 2010 by Ordinance 2010-10, and is now proposed to be extended for six months. The County is in the process of updating the zoning classifications to be consistent with the adopted 2007 Comprehensive Plan or the adopted Subarea Plans. There are over 15,000 acres of private land that are located outside of the existing zoning classification areas but are included in the 2007 Comprehensive Plan.

Since the legislative planning process to update the zoning classifications is not yet complete and the legislative process should be protected from circumvention by developers, the Board of County Commissioner should extend for six months the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

FISCAL IMPACT

No Fiscal Impact

RECOMMENDATION

It is the recommendation of the Community Development Department that the Board, after conducting a public hearing, adopt proposed Ordinance 2011-03 extending the moratorium for a period of six months.

LIST ATTACHMENTS

Ordinance 2011-03

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

UPON REFERRAL FROM THE
WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY
INDUSTRIAL SITING DIVISION

STATE OF WYOMING

IN THE MATTER OF THE INDUSTRIAL)
SITING PERMIT APPLICATION OF) DOCKET NO. DEQ/ISD 10-02
PIONEER WIND PARKS, WASATCH)
WIND INTERMOUNTAIN, LLC)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING PERMIT APPLICATION WITH CONDITIONS AND
ALLOCATING IMPACT ASSISTANCE FUNDS

THIS MATTER came before the Industrial Siting Council (Council) on May 16, 17 and 18, 2011 and June 13, 2011, for evidentiary hearing. The record was officially closed on June 13, 2011. Council members present for the proceedings included Shawn Warner, Chairman, Sandy Shuptrine, Darrell Offe, Gregg Bierei, Jim Miller, Peter Brandjord and Mike Daly. Bridget Hill, Senior Assistant Attorney General, was also present on the Council's behalf. Deborah A. Baumer from the Office of Administrative Hearings served as the Hearing Examiner in the proceedings. The Applicant, Pioneer Wind Parks, Wasatch Wind Intermountain (Wasatch Wind) appeared by and through its counsel, Brent R. Kunz and John A. Masterson. The Industrial Siting Division (Division) appeared by and through its counsel, Assistant Attorney General, Luke J. Esch. Seven other parties participated in the evidentiary hearing including Natrona County represented by Bill Knight, Converse County represented by Quentin Richardson, the Town of Rolling Hills represented by F. Scott Peasley, Grant Ranch represented by Lynne Boomgaarden, True Ranches represented by David L. True, Chester and Jennifer Hornung (the

Hornung's) represented by Scott J. Olheiser and the Northern Laramie Range Alliance/Northern Laramie Range Foundation (NLRF) represented by Peter C. Nicolaysen. Wasatch Wind's Application (WWI), Addenda 1 and 2, Replacement Pages, Exhibit B consisting of Exhibits 1 through 26 (Exhibit 10 revised) and Rebuttal Exhibits 1 through 4, the Division's Exhibits 1 through 4, Converse County's Exhibits 1 and 2, Grant Ranches Exhibits 1 through 6 (Exhibit 6 revised), Hornung's Exhibits 1 through 4, and NLRF's 1, 2, 4, 5, 6, 10, 11, 12, 21, 24, 27, 28, 29, 34, 38 through 47, 49, 50, 51, 51PP, 52, 52R and 55 were admitted for purposes of the evidentiary hearing. The Council also received 28 limited appearance statements in this case before the close of the evidentiary hearing and considered those statements in making its final decision. The Council has considered the evidence and argument of the Applicant and the parties, and makes the following findings:

I. JURISDICTION

Wyo. Stat. Ann. § 35-12-106(a) (LEXIS 2010) provides that, "No person shall commence to construct a facility, as defined in this chapter, in this state without first obtaining a permit for that facility from the council."

"Industrial facility" or "facility" means any industrial facility with an estimated construction cost of at least one hundred seventy eight million, three hundred thousand dollars (\$178,300,000.00) and any commercial facility generating electricity from wind and associated collector systems that consists of 30 or more wind turbines. Wyo. Stat. Ann. § 35-12-102(a)(vii) (LEXIS 2010).

10. According to Mikell, the turbine site was chosen because the data collected by Grant Ranch, the location of the Projects, was shown to be extremely windy. Additionally, transmission lines were within close proximity to the proposed site and a market to sell the power existed. *Tr. of Proc.*, pp. 40-42.

11. Due to concerns expressed by the citizens of the area, Wasatch Wind agreed that, subject to FAA approval, lighting technology would be retrofitted on the turbines to turn off the blinking red lights unless a plane is flying nearby. Mikell testified that Wasatch Wind would not be opposed to a permit condition requiring installation of the technology once it is approved.

According to Mikell, only one resident would be affected by shadow flicker which would be noticed nine minutes each year. That resident is a lessor and has no objection to the Projects. Additionally, on April 1, 2011, a revised turbine layout was submitted to the Division. The revision occurred as a result of view shed concerns of Glenrock citizens surrounding a golf course, and the close proximity to the Huxtable Ranch listed on the National Historic Register of Places as a historic property on April 7, 2011. Huxtable Ranch, also known as the White Creek Ranch, is owned by Kenneth Lay. A total of seven turbines were moved, five to a string closer to the Hornung's property. Portions of seven turbines will be visible from the White Creek Ranch driveway. Seven residences are within two miles of the closest turbine. Six of the seven residences have signed leases with Wasatch and none are opposed to the Projects. Twenty-one residences are within five miles of the Projects, and six have publicly opposed the Projects. Thirty eight residences are within 7.6 miles from the nearest turbine and one additional resident opposed the Projects. *Tr. of Proc.*, pp. 54-58, 104-109, 112; 1060-1061; 1066; *Wasatch Wind Exhibits 7, 9 and 10R; Rebuttal Exhibit 1.*

Converse County. The Director of Land Acquisition, Sam Lichenstein (Lichenstein), attended the meeting and spoke to the Hornung's. Other than mailing, Wasatch Wind has had no further direct contact with the Hornung's. Stevens and Lichenstein also had direct contacts with Kenneth Lay, who is opposed to the Projects. *Tr. of Proc.*, pp. 369-379.

21. Stevens testified that Wasatch knew that visual aesthetics were a concern in the area. As a result, if approved by the FFA, Wasatch Wind will use AVWS radar system which keeps night skies dark and the lights on the turbines off unless an aircraft is approaching.

Wasatch also chose seven key observation points and did visual simulations which were presented at the November 9, 2010, open house. Turbines were only visible from four of the observation points. Stevens also met with 20 landowners in Glenrock who expressed concerns about the turbine locations. Turbines were relocated as a result of that meeting. In Stevens' professional opinion, the Pioneer Wind Park I and Pioneer Wind Park II met the notification requirements in the statute. *Tr. of Proc.*, pp. 379-383.

22. George Blankenship (Blankenship) conducted the socioeconomic assessments for Wasatch Wind. Blankenship has 32 years of experience in conducting socioeconomic assessments and has worked on 15 industrial siting applications. Blankenship reviewed monitoring reports from nearby wind farm projects to determine the residency distribution during the peak quarters of construction. Within the three nearby projects, over 95 percent of non-local construction work force lived in Converse and Natrona Counties. Of that amount of workers, 95 percent lived in the three communities of Glenrock, Douglas and Casper. Pioneer Wind Park I construction schedule starts with 100 workers in the first month and peaks at 168 workers in the second month. The work force then drops to 80 workers after the first two months and in the final month, drops to 45 workers. Pioneer Wind Park I estimates 17.8 construction worker

decommission and reclaim the facility. If sufficient financial resources are not obtained within two years, the Permit shall expire.

Special Condition #20. Upon opponent landowner agreement, the Applicant will negotiate in good faith, mitigation for visual and potential audio impacts of Pioneer Wind Projects I and II, such as but not limited to vegetative screening.

Special Condition #21. FFA approval for remote control night lighting of wind generating towers will be sought and installed within six months of FFA approval.

ORDER

IT IS THEREFORE ORDERED that the Industrial Siting Permit Application known as Wasatch Wind Intermountain, LLC, doing business as Pioneer Wind Park I, LLC and Pioneer Wind Park II, LLC, as submitted by the Applicant and modified by this Council as set forth above in Permit Conditions #1 through #21 is granted.

DONE this __18__ day of July, 2011.

_____/s/_____
Shawn Warner, Chairman
Industrial Siting Council
Herschler Building, Fourth Floor West
122 West 25th Street
Cheyenne, Wyoming 82002
(307) 777-7170

**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of
Application No. 2009-01

WHISTLING RIDGE ENERGY LLC

WHISTLING RIDGE ENERGY PROJECT

CERTIFICATE OF SERVICE

I hereby certify that on the date written below, I caused delivery of electronic copies of the following document to EFSEC via electronic mail, and delivery of the original and twelve paper copies of the same document to EFSEC by personal delivery:

FRIENDS OF THE COLUMBIA GORGE'S PETITION FOR
RECONSIDERATION

I further certify that on the same date, I caused delivery of electronic copies of the above-listed document by electronic mail and paper copies of the same document by first-class mail to each of the persons listed on EFSEC's official service list for the proceeding dated October 4, 2011 and posted on EFSEC's web site.

Dated this 27th day of October, 2011.

/s/ Gary K. Kahn

Gary K. Kahn, WSBA No. 17928